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WEST COAST REPORTER.

WHOLE No. 81. JULY 16, 1885. VOL. VII. No. 1.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

NASH *v.* EL DORADO COUNTY.

July 6, 1885.

COUNTIES ARE CORPORATIONS SUBJECT TO BE SUED.—Section 4,000, political code, constitutes counties corporations, and sections 4,002-3 authorize them to be sued.

STATUTE OF LIMITATIONS—RESIGNATION OF SUPERVISORS, to avoid service of summons in a suit, does not prevent, or intercept the running of the statute of limitations.

LIMITATIONS—COMMENCEMENT OF SUIT.—A suit is commenced within the meaning of the statute of limitations by the filing of a complaint, without service of summons.

COUPONS—LIMITATIONS.—A right of action accrues upon coupons at the moment they fall due, and the statute of limitations commences to run upon coupons, from their maturity.

INTEREST ON COUPONS.—Under section 1,917, civil code of California, where there is no special provision as to interest upon bonds and coupons, both the bonds and the coupons bear interest, after maturity, at the ordinary legal rate, whether the coupons are detatched from the bonds or not.

SPECIAL LIMITATION ACTS CONSTITUTIONAL.—The legislature of the state of California has the power to pass special acts of limitation, applicable to a particular county indebtedness.

STATUTE OF LIMITATIONS AS TO BONDS AND COUPONS.—Coupons are regarded as part of the bonds, and the same limitation applies to coupons as that applicable to the bonds, of which they constitute a part. If an action is barred on a bond in four years after it matures, the statute runs four years on the coupons attached to the bond after the coupons become due; but the statute commences to run on the bond from its maturity, and upon the coupon from the time it becomes payable.

B. S. Brooks, for the plaintiff.

A. L. Rhodes, for the defendant.

SAWYER, C. J., delivering an oral decision: This is an action brought upon bonds of El Dorado county, issued by the county, in pursuance of the statute, for the purpose of aiding in the construction of the Sacramento Valley railroad. The action is brought upon the bonds and the coupons for interests upon the bonds. The bonds, in this instance, have twelve years to run, the bonds and coupons calling for the payment of interest semi-annually. The bonds provide for the payment of interest at ten per cent per annum, at specified times, semi-annually, "on surrender of the coupons for interest." Coupons were attached for interest running over the entire period, till the maturity of the bonds. The action is, in form, upon the bonds, and for interest, with no separate counts upon the coupons. The main question relied upon is, as to what, and for how long a period, interest can be recovered, in view of the statute of limitations. The demurrer goes to the amount of the recovery, rather than the general sufficiency of the complaint.

The object seems to be to get the ruling of the court as to what rate of interest the bonds and the coupons bear, after maturity,— the interest called for in the bond being ten per cent per annum; and as to the effect of the statute of limitations on the coupons. That being the object, and these points having been argued, notwithstanding the difficulty of reaching the point by demurrer, I have no objection to expressing my views upon the subject now. It is claimed that the county is not liable to be sued at all. But the act of 1854, statutes 1854, p. 45, authorizes counties to be sued. That act was in force until the adoption of the code. Section 4,000, political code, constitutes counties corporations, and sections 4,002 and 4,003, anthorize them to be sued. Under that statute, and under the present codes, then, the county, since 1854, has been, and it now is, subject to be sued on its bonds. It is alleged, for the purpose of avoiding the statute of limitations, that, for a certain period during the running of the statute, on these bonds, there was no board of supervisors for El Dorado county, the members having all resigned, for the express purpose of evading service of summons in a suit, so that no valid service could be made upon anybody. But, under the statute of limitations, no service is necessary to constitute the commencement of a suit: Code Civ. Proc., sec. 350.

The suit is commenced within the meaning of the statute, by the filing of the complaint; so there is no time that suit could not have been commenced, within the meaning of the statute, against El Dorado county. Suit could have been commenced at any time, in such sense as to stop the running of the statute of limitations.

Coupons do not bear interest until they become due. I have no doubt that they bear interest from the date of their maturity, at the *legal* rate. It has been, repeatedly, so held by the supreme court of the United States. All of the cases decided in the supreme court of the United States, hold that the statute of limitations runs upon coupons from the date of their maturity. Though incidental to the principal agreement, they are independent obligations intended to be cut off from the bonds, and passed from hand to hand; and, it is held, whether cut off or not, that the right of action accrues upon them as soon as they fall due. But it is claimed by the complainant, here, that he has counted upon his bonds, alone, claiming interest not on an independent contract, but only as an incident to, and a part of the bond itself. The bonds provided, that interest should be paid at specified times semi-annually, as designated in the coupons attached. The money fell due at specified times, the bond not being yet due, and the right of action accrued, and the holder could commence an action upon the maturity of those coupons. They could be cut off and transferred separately as independent negotiable paper. If I were to execute a mortgage to secure, say, six thousand dollars borrowed money, giving three notes for two thousand dollars each, payable respectively, one of two thousand dollars in one year, one in two years, and one in three years, there can be no doubt, that an action would accrue on each, as it matured. So,

also, if, instead of notes, I should give a bond for six thousand dollars, payable two thousand dollars in one year, two thousand in two, and two thousand in three years, it would be the same as in the case of the notes. Each installment matures at a particular time, and at that time the payee is entitled to his money; the right of action accrues, and an action may be commenced at any time within the time prescribed by the statute of limitations after the right of action accrues. I have no doubt, therefore, that the right of action upon the coupons accrues upon the maturity of the coupons, and do not think the statute will be evaded in consequence of the coupons being for interest, and attached to the bonds. As to those coupons, then, against which the statute has run more than four years since their maturity before the commencement of the action, the action is barred under the statute of limitations. But, in this particular case, another point arises. A special act was passed in 1876, statute 1875–6, page 686, section 6, which suspended the running of the statute upon these particular bonds and coupons, until the meeting of the next legislature; and in 1878, statutes 1877–8, page 76, section 5, the same provision was again enacted, which suspended the running of the statute of limitations until the meeting of the following legislature—the two periods in the aggregate amounting to over three years. On each occasion, the running of the statute is expressly suspended by these special statutes. It is claimed that it is incompetent for the legislature to pass a special law applicable to these cases alone. I think otherwise. I do not see any reason why the legislature might not pass a law suspending the running of the statute in these special cases, as well as in any other general class of cases. The running of the statute was suspended during these periods and that period must be added to the time prescribed by the general statutes. Adding this time, I believe all the coupons, except the last two on each class of bonds are barred.

Another point requires notice. The claim is that these coupons do not mature until the maturity of the bonds. That is not the point decided in the cases relied on, cited from the United States supreme court. The point in The City v. Lamson, 9 Wall., 477, and in Lexington v. Butler, 14 Wall., 282, was that a coupon would be regarded as a part of the bond, and the same term would apply to the coupon, that would apply to the bonds. That is to say, if the bond is not barred until twenty years after its maturity, the coupons will not be barred till twenty years after they become due; the same limitations being applied to the coupons that is applied to the bonds. See Clark v. Iowa City, 20 Wall., 587.

The question did not arise in these cases as to the time when the statute began to run. It was only decided, that after the statute began to run on the coupons it had the same time to run that the bond had after its maturity. It is very clear that no other question was passed upon. But it is equally clear that in the subsequent decisions in Amy v. Dubuque, 98 U. S., 474, and in Koshkonong v. Burton, 104 U. S., 668, the statute begins to run at the maturity of

the coupons, whether the coupons are detached or not; and on the bonds from the maturity of the bonds. The time on the coupons is the same as the time on the bonds. If an action on the bond is barred in four years after the maturity of the bond, an action on the coupons is barred in four years, after their maturity.

There is another question as to interest, after maturity, and as to the rate. The bond is payable in twelve years, interest payable semi-annually, according to the coupons annexed. The interest on the bond specified in the instrument during the time, is ten per cent. There is no provision as to interest after maturity. It is claimed that the bond, after its maturity, bears interest at ten per cent, or the rate prescribed in the bond. I do not think so. There is no contract in writing to pay interest at that rate, after the maturity of the bond. The contract specifies a specific time for payment, and there is no provision for paying interest until actually paid. It is payable at a specified time, and at such rate as prescribed. The contract assumes that the money will be paid when it falls due, and make no provision for any other contingency. There is no contract in writing as to the rate of interest to be paid after the bond becomes due. Until the time it becomes due, the rate of ten per cent per annum prevails. There is no contract to pay interest on the bonds, or on the coupons, after they become due, and the interest is recoverable only at the legal rate, in accordance with the express provision of the code. Section 1,917 of the civil code provides that: "Unless there is an express contract in writing fixing a different rate, interest is payable on all moneys at the *legal* rate of *seven per cent* per annum *after they become due on any instrument of writing*," etc. These bonds and coupons are instruments in writing, and they are governed by this provision of the code. There is no contract in writing as to the rate of interest which the bonds or coupons shall bear after they become due. They must, therefore, bear the legal rate of seven per cent. Section 1,919 provides in what cases *interest* shall bear interest, *according to the rate agreed upon as to principal;* and this case does not come within the provision.

The court granted a re-argument upon the question of interest on application of defendant's counsel, upon which the following oral decision was rendered.

Upon the re-argument, I do not see any grounds for changing the views before expressed. In my judgment, the cases now cited by counsel for defendant from the California reports arising upon statutes of the state, do not decide the precise points presented in this case. Beale v. Amador Co., 28 Cal., 349, is not like this. In that case, there was only an equitable demand, growing out of a division of the county, which the statute imposed upon the new county an obligation to pay. The sum fixed by the legislature was specific, and the obligation extended no further than the law expressly required. Besides, it was only to be paid from time to time, when the fund raised should be sufficient, and not, absolutely, on a specific day. Soher v. Calaveras Co., 39 Cal., 134, was similar to Beale v.

Amador Co. in principle. So as to interest on the coupons after maturity, the case of Savings and Loan Society v. Horton, 63 Cal., 105, is different. In that case, interest was charged upon interest after it became payable, due generally, and not upon coupons as separate contracts, at the *contract rate paid on the principal*, which was different from and larger than the legal rate. The court held this to be erroneous under section 1,919, civil code, before cited. I do not think it applies to this case.

The several points upon which an opinion is expressed are scarcely reached by the demurrer. But, I understand that new bonds are expected to be issued in pursuance of a recent statute, as soon as the amount of the liability of the county is judicially ascertained. Perhaps the views expressed will answer the purposes of the parties without further action. As no point is made as to the validity of the bonds, the complaint, at least, states a good cause of action for the amount shown to be due not barred and that, upon the views expressed, seems to be but a matter of calculation. So that the demurrer must be overruled, and it is so ordered with leave to answer on or before the rule day in August.

HALL v. EL DORADO CO.

SAWYER, C. J. This case is similar to Nash v. El Dorado Co., and must be decided in the same way. Let a similar order be entered.

DISTRICT COURT, DISTRICT OF ALASKA.

UNITED STATES *v.* KIE.

May Term, 1885.

ALASKA NOT AN INDIAN COUNTRY—OFFENSE AGAINST INDIAN—JURISDICTION OF DISTRICT COURT.—The territory of Alaska is not "Indian country," within the meaning of that term as used in the acts of congress; and, consequently, the district court of the district of Alaska has jurisdiction to try an Indian for an offense committed by him against another Indian in such territory, prior to the act of March 3, 1885.

MOTION to discharge the defendant. The opinion states the facts.

MCALLISTER, J. A motion has been made for the discharge of the prisoner, on the ground that the evidence before the court shows that the crime was committed by an Indian on the person of another Indian in the territory of Alaska, and it is claimed by counsel for the prisoner that Alaska is Indian country, and that this court has no jurisdiction over an offense committed by an Indian against another Indian in "Indian country." As the crime charged in the indictment was committed, as it is alleged, in September, 1884, the recent act of congress approved March 3, 1885, which act gives to the court jurisdiction over crimes committed by an Indian against another Indian within any territory of the United States, and within or without an Indian reservation, this late act not being retroactive cannot apply to the present case, and the law in regard to "Indian country" as contained in the statutes on the day that this crime is alleged to have been committed, must govern the decision of the question now before the court.

The evidence shows that the prisoner, Charles Kie, is an Indian of the Stickeen tribe, that he is charged with having killed his wife Nancy, an Indian of the Chilcat tribe, at the town of Juneau, within this territory, the question, therefore, which the court is now called upon to decide is, whether or not the territory of Alaska is "Indian country." If it is Indian country then the prisoner who is an Indian, and stands charged with having committed a crime against the person of another Indian within this territory, is most certainly entitled to the benefit of the law passed by congress in regard to "crimes committed by an Indian against the person or property of another Indian in the 'Indian country,'" and the revised statutes, by section 2,146, expressly exclude from the jurisdiction of the United States the case of a crime committed in the "Indian country," by one Indian against the person or property of another Indian, and consequently this court would not have jurisdiction to try the indictment.

If, on the other hand, this territory has not been declared by law to be Indian country, and the court should so hold, the law passed by congress for the government of such country would, therefore, not be in force here, and this court, sitting as a territorial district court, and administering the laws of this territory, would appear to have jurisdiction to try the prisoner for the offense with which he stands charged.

The law in regard to "crimes committed in the Indian country by an Indian against another Indian" is, as I read it, as follows: Title lxx. of the revised statutes relates to crimes against the United States, and in chapter three, which speaks of crimes arising within the maritime and territorial jurisdiction of the United States, it provides that every person who commits murder * * * within any fort, arsenal, dock yard, magazine or in any other place or district of country under the exclusive jurisdiction of the United State * * * shall suffer death. Title xxviii. of the revised statutes relates to Indians, and the sub-title of chapter four is "government of Indian country." It includes many provisions regulating the subject of intercourse and trade with the Indians in Indian country, and imposes penalties and punishment for various violations of them. Section 2,142 provides for punishment of assaults with deadly weapons and intent, by Indians upon white persons, and by white persons upon Indians. Section 2,143 for the case of arson, in like cases, and section 2,144 provides that "the general laws of the United States defining and prescribing punishments for forgery and depredations upon the mails shall extend to the Indian country."

The next two sections are as follows: "Section 2,145. Except as to crimes, the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the district of Columbia, shall extend to the Indian country." Section 2,146. "The preceding section shall not be construed to extend to [crimes committed by one Indian against the person or property of another Indian, nor to] any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case when by treaty stipulations the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." That part of section 2,146 placed within brackets was in the act of twenty-seventh of March, 1854, c. 26, sec. 10 stat., 270, was then omitted by the revisers in the original revision, and restored by the act of eighteenth of February, 1875, c. 50, 18 stat., 318, and now appears in the second edition of the revised statutes.

It may be assumed for the purposes of this opinion, that the omission in the original revision was inadvertent and that the restoration evinces no other intent on the part of congress than that the provision should be considered as in force, without interruption, and not a new enactment of it for any other purpose than to correct the error of the revision. Section 2,145, revised statutes, therefore extends the general laws of the United States as to the punishment of crimes committed in any place within their sole and exclusive jurisdiction, except the district of Columbia, to the "Indian country." But section 2,146 expressly excepts from its operation "crimes committed by one Indian against the person and property of another Indian in the Indian country."

Therefore, if the crime with which this prisoner stands charged, was committed in the Indian country, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, which laws were extended to the Indian country by section 2,145, revised statutes, are not applicable, as section 2,146, revised statutes, expressly excepts from its operation the case of a crime committed in the Indian country by one Indian against the person or property of another Indian.

The provisions now contained in sections 2,145 and 2,146 of the revised statutes were first enacted in section 25 of the Indian Intercourse Act of 1834, 4 statutes, 733; prior to that, by the act of 1796, and the act of 1802, offenses committed by Indians against white persons and by white persons against Indians were specifically enumerated and defined, and those by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs. The policy of the government in that respect has been uniform, as was said by Mr. justice Miller, delivering the opinion of the court in United States v. Joseph, 94 U. S., 614, 617: "The tribes for whom the act of 1834 was made, were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized state or territory, and, in regard to their domestic government, left to their own rules and traditions, in whom we have recognized the capacity to make treaties and with whom the government, both state and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals." As I understand the law, as declared by congress, if this territory is "Indian country," this court has no jurisdiction, the prisoner being an Indian and charged with having committed a crime against another Indian in this territory, he therefore comes within the provisions of section 2,146, and if he is punished, it must be by the laws, manners and customs of his tribe.

But is the territory of Alaska Indian country? Has it been so declared by law?

There are several able opinions on this question by judge Deady, in Sawyer's Reports. In the first of these cases, the case of United States v. Seveloff, 2 Sawyer, 311, that learned judge held that "Alaska was not Indian country," so declared by law * * * that because a country is inhabited, or owned in whole, or in part by Indians, that it is not, therefore, an Indian country, * * * that the act of 1834, the Indian Intercourse Act, cannot be held to have extended itself or migrated over Alaska upon its cession by Russia to the "United States," * * * that, if congress should think it desirable that any provision of the "Indian intercourse act should be in force in Alaska, it can so provide beyond doubt." And, in March, 1883, congress did legislate in regard to the matter by amending section 1, of the Alaska act of July 27, 1868, 15 stat., 240, by the act of March 3, 1873, 7 stat., 530, so as to extend over the

territory of Alaska. Sections 20 and 21 of the intercourse act of 1834, and the territory, so far as the introduction and disposition of spirituous liquor is concerned, became what is known as "Indian country." In the case of Water v. Campbell, 4 Sawyer, 121, decided in 1876, the same learned judge held that Alaska was not "Indian country," in the technical sense of that term, any further than congress has made it so, and refers to United States v. Seveloff, 2 Sawyer, 312, and *In re* Carr, 3 Sawyer, 317. Again, in the case of United States v. Stephens, 8 Sawyer, 117, which was decided in 1882, the court refers to it, from decisions, to the effect that Alaska is not "Indian country," except in so far as sections 20 and 21, of the intercourse act of 1834, have made it so.

If, therefore, this territory is "Indian country," it must be because congress has so declared it, but I do not find that congress has, in the various laws passed for the government of this country, anywhere declared Alaska "Indian country," on the contrary, congress, by amending the Alaska act of 1868, by the act of March, 1873, and making two sections of the Indian intercourse act of 1834 applicable to Alaska, have so legislated in regard to the matter, that the natural and plain inference and meaning to be gathered from the various statutes is, that Alaska is "Indian country" for the purposes of sections 20 and 21 of the act of 1834, but is not "Indian country" in any other sense. Volume xiv, Opinions Attorneys General, contains, at page 327, a letter from the honorable attorney general to the secretary of war, under date of November 13, 1873. This letter, it will be observed, was written after the two above mentioned sections had been made applicable, by the amendment of March, 1873. The attorney general said in answer to the direct question "as to whether or not the territory of Alaska was embraced within the term 'Indian country,'" that, in his opinion, Alaska is to be regarded as "Indian country" as to this matter, namely, the introduction of spirituous liquors, to which sections 20 and 21, of the act of 1834, apply.

Then, in September, 1878, the same question was submitted to the attorney general by the secretary of the treasury: xvi. Opinions Attorneys General, 141; and the attorney general in his answer says: "In the opinion of my predecessor, dated in 1873, an answer to the inquiry whether the territory of Alaska was embraced within the term 'Indian country,' he holds, that as to the provisions of sections 20 and 21 of the intercourse act, which were made applicable by the amendment of March, 1873, Alaska is to be regarded as 'Indian country;' but it will be observed that he limits his opinion to these two sections, and does not hold that, in the general use of the term, Alaska is to be treated as 'Indian country,' and be subjected to all the laws which have been made in relation to such country. * * * The provisions of the act of 1834 are not in terms extended over the territory of Alaska. When two sections of the same statute are expressly made applicable to a certain people by extension, it must be inferred that there was no intention, on the part of congress, to ex-

tend more than those two sections. Alaska cannot be considered merely as an Indian country. It is inhabited, to a limited extent, by white persons, whose rights, property and religion, which were guaranteed by the treaty between the United States and Russia, should be protected by the United States, and the whole territory cannot be subjected to the rules applied to 'Indian country' until, at least, congress should expressly render it subject to them."

The article of the treaty referred to reads as follows: "Article iii. of the convention between the United States of America and his majesty the emperor of Russia for the cession of the Russian possession in North America to the United States, concluded at Washington March 30, 1867, provides that: The inhabitants of the ceded territory, according to their choice reserving their natural allegiance, may return to Russia within three years, but if they should prefer to remain in the ceded territory, they, with the exception of the uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages and privileges of citizens of the United States, and shall be maintained and protected in the enjoyment of their liberty, property and religion. The uncivilized native tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."

The above authorities certainly are strongly against this being Indian country; the cases referred to in Sawyer's reports, commencing with United States v. Seveloff, decided in 1872, before section 20 and section 24, were made applicable, and extending to 1882, when United States v. Stevens, was decided, are all to that effect; the opinions of the attorneys-general are also directly in point. These authorities hold substantially that Alaska is not "Indian country," because congress has not declared it so; that the act of 1834 did not extend itself, *proprio vigore*, over Alaska on its cession to the United States; that congress having made two sections of the act of 1834 applicable, it must be inferred that there was no intention to extend more than those two sections; that the country is inhabitable by white persons whose rights, property and religion are guaranteed by treaty; that the act of 1834 was a local act, and contained no provision by which it should in the future be extended in any direction.

Counsel for the prisoner rely to a great extent on the case of *Ex parte* Crow Dog, 109 U. S., 556, at page 561, where the court defines "Indian country." This case was decided at the October term of the supreme court, 1883, Mr. justice Matthews delivering the opinion of the court.

The question of jurisdiction was deemed by congress to be of such importance to the prisoner and the public, as to justify a special appropriation for the payment of the expenses incurred on his behalf, in presenting the case to the supreme court of the United States. Congress therefore, on the third of March, 1883, 22 stat., 624, appropriated one thousand dollars for his defense. The facts are as follows: The prisoner Crow Dog, an Indian of the Sioux

tribe, murdered another Indian of the same tribe called Spotted Tail, on the Indian reservation in Dakota, he was convicted before the first judicial district court of Dakota, and the judgment was affirmed on a writ of error, by the supreme court of the territory. A petition for a writ of *habeas corpus* was made to the supreme court of the United States, and that court held, that the district court of Dakota was without jurisdiction to find or try the indictment against the prisoner, and that the conviction and sentence were void. The court held that the offense was committed in "Indian country," but the argument in support of the jurisdiction of the district court was to the effect that admitting that the offense was committed in "Indian country," that section 2,146, revised statutes, was not applicable, because it had been repealed by the operation and legal effect of the treaty with the different tribes of the Sioux Indians, of April 1868, and an act of congress of February, 1877; but the direct point decided in the case was, that "neither the provisions of the treaty with the Sioux Indians, that if bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent, and notice by him, deliver up the wrong doer to the United States, to be tried and punished according to its laws, nor any other provision in that act, nor the provision in article 8 of the agreement in the act of February, 1877, that they shall be subject to the laws of the United States, 'nor any other provision in that agreement or act, operated to repeal the provisions of the revised statutes, sec. 2,146, which excepts from the general jurisdiction of courts of the United States over offences committed in 'Indian country,' crimes committed by one Indian against the person or property of another Indian." Therefore, this case is not a direct authority on the question now before us, as there is no doubt that if this is "Indian country," section 2,146 is applicable; the case of Crow Dog is, however, most valuable for its discussion of the question as to what constitutes Indian country.

At pages 560 and 561, Mr. justice Matthews says: "The first section of the Indian Intercourse Act of June 30, 1834, 4 statutes, 729, defines the 'Indian country' as follows: That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purpose of this act, be taken and be deemed to be the 'Indian country.' Since the passage of that act great changes have taken place by the acquisition of new territory, by the creation of new states, and by the organization of territorial governments; and the revised statutes, while retaining the substance of many important provisions of the act of 1834, with amendments and additions since made regulating intercourse with the Indian tribes, has, nevertheless, omitted all definition of what now must be taken to be 'Indian

country.' Nevertheless, although the section of the act of 1834, containing the definition of that date has been repealed, it is not to be regarded as if it had never been adopted, but may be referred to in connection with the provisions of its original context which remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country when it is spoken of in the statutes. It is an admitted rule in the interpretation of statutes that clauses which have been repealed may still be considered in construing the provisions that remain in force. This rule was applied in reference to the very question now under consideration in Bates v. Clark, 95 U. S., 204. It was said in that case by Mr. justice Miller, delivering the opinion of the court, that it follows from this that all the country described by the act of 1834 as 'Indian country,' remains Indian country as long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of congress. In our opinion, that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the extreme geographical limits of a state, not excepted from its jurisdiction by a treaty or by statute, at the time of its admission into the Union, but saving even in respect to territory not thus excepted, and actually in the exclusive occupancy of Indians, the authority of congress over it under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it: United States v. McBratney, 104 U. S., 621. This definition, though not now expressed in the revised statutes, is implied in all those provisions, most of which were originally connected with it when first enacted, and which still refer to it. It would be otherwise impossible to explain these references or give effect to many of the most important provisions of existing legislation for the government of 'Indian country.'"

Now, does the above description of what constitutes Indian country, enlarge or extend the original description in the act of 1834? When the court refers to the Act of 1834, resurrects it, as it were, it certainly is for the purpose of showing what was "Indian country" as described by that act. The revised statutes have omitted all definition of what must now be taken to be "Indian country," the court therefore refers back to the first section of the act of 1834, and the description therein contained. The court also refers to Mr. justice Miller's definition in Bates v. Clark, 95 U. S., 204, as follows: "All the country described by the act of 1834, remains Indian country, so long as the Indians retain their original title to the soil, and

ceases to be Indian country, whenever they lose that title in the absence of any different provision by treaty or by act of congress," and the court then say, "in our opinion the above definition applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of *it* has been acquired since the passage of the act of 1834 and notwithstanding the formal definition in that act has been dropped from the statutes."

This second definition by the court, in which they adopt justice Miller's definition as the foundation, would possibly seem from its language, *to extend the description of "Indian country,"* contained in the act of 1834, but it will be observed, on careful reading, that it *does not* go further than justice Miller's definition, and his definition is *expressly limited* to the country described by the act of 1834.

Therefore, if Alaska was embraced within the description and definition of "Indian country" as contained in the act of 1834, and if the definition of what is *now* to be considered "Indian country" in *ex parte* Crow Dog, is limited to the description in the act of 1834, if this is so, then the case of "Crow Dog" is to be considered rather as an authority against Alaska being "Indian country." It will be remembered that the case of United States v. Seveloff, 2 Sawyer, 311, is a direct authority to the effect that the act of 1834, defining the limits of the "Indian country," was not extended over Alaska.

Counsel for the prisoner also refer to the remarks of Mr. justice Matthews in *ex parte* Crow Dog at page 571, where the learned judge, speaking of the injustice of making Indians amenable to our laws, says, "it is a case where the law is sought to be extended over aliens and strangers, over the members of a community separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them; which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the tradition of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge, by the maxims of the white man's morality."

The above remarks are, no doubt, deserving of most careful consideration, and they apply with equal force to the case now before us. It, no doubt, has been the policy of the government to leave an Indian, who commits a crime against another Indian, to be punished

country.' Nevertheless, although the section of the act of 1834, containing the definition of that date has been repealed, it is not to be regarded as if it had never been adopted, but may be referred to in connection with the provisions of its original context which remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country when it is spoken of in the statutes. It is an admitted rule in the interpretation of statutes that clauses which have been repealed may still be considered in construing the provisions that remain in force. This rule was applied in reference to the very question now under consideration in Bates v. Clark, 95 U. S., 204. It was said in that case by Mr. justice Miller, delivering the opinion of the court, that it follows from this that all the country described by the act of 1834 as 'Indian country,' remains Indian country as long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of congress. In our opinion, that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the extreme geographical limits of a state, not excepted from its jurisdiction by a treaty or by statute, at the time of its admission into the Union, but saving even in respect to territory not thus excepted, and actually in the exclusive occupancy of Indians, the authority of congress over it under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it: United States v. McBratney, 104 U. S., 621. This definition, though not now expressed in the revised statutes, is implied in all those provisions, most of which were originally connected with it when first enacted, and which still refer to it. It would be otherwise impossible to explain these references or give effect to many of the most important provisions of existing legislation for the government of 'Indian country.'"

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Therefore, if Alaska was embraced within the description and definition of "Indian country" as contained in the act of 1834, and if the definition of what is *now* to be considered "Indian country" in *ex parte* Crow Dog, is limited to the description in the act of 1834, if this is so, then the case of "Crow Dog" is to be considered rather as an authority against Alaska being "Indian country." It will be remembered that the case of United States v. Seveloff, 2 Sawyer, 311, is a direct authority to the effect that the act of 1834, defining the limits of the "Indian country," was not extended over Alaska.

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The above remarks are, no doubt, deserving of most careful consideration, and they apply with equal force to the case now before us. It, no doubt, has been the policy of the government to leave an Indian, who commits a crime against another Indian, to be punished

by the laws, manners and customs of his tribe. The remarks of justice Matthews certainly should receive all the consideration that counsel claim for them, but they cannot change the law, and however great a hardship it may be to put this prisoner on his trial, and try him, as justice Matthews remarks, "not by his peers, nor by the customs of his people, nor the law of his land, but according to the law of a social state of which he can have but an imperfect conception, and which is opposed to the traditions of his history, and to the strongest prejudices of his savage nature," however great a hardship this may be, the remedy is with the law making power,—it is the duty of this court to administer the law as it is laid down.

Prior to 1873, when congress amended the Alaska act of 1868, a law was greatly needed in regard to the introduction of spirituous liquors; the district court of Oregon had held that this territory was *not* "Indian country," and that the law prohibiting the introduction of liquor in such country was not in force here. The court further said, if congress desires that this or any other provision of the Intercourse Act should be in force in Alaska, it can so provide beyond doubt, and congress did so provide the next year, by making this territory "Indian country," as far as the introduction of liquor was concerned. In the case now before us, if congress think proper they can extend the first section of the Intercourse Act of 1834 over Alaska, as they have already extended secs. 20 and 21 of that act, and by so doing make this "Indian country," and thus extend over the Indians, the "uncivilized native tribes," as they are spoken of in the treaty, the provisions of section 2,146, which excepts them from the jurisdiction of our laws, as far as crimes against each other are concerned.

It has been strongly urged in the argument that if there is any doubt in regard to this question that the court should decline jurisdiction, and counsel refer to Mr. justice Matthews' language, where he says, speaking of the territorial district court of Dakota, and of the advisability of holding that territory to be "Indian country:" "The nature and circumstances of this case strongly reinforce this rule of interpretation. It is a case involving the judgment of a court of special and limited jurisdiction, not to be assumed without clear warrant of law. It is a case of life and death. It is a case where, against an express exception in the law itself, that law by argument and inference only is sought to be extended over aliens and strangers."

It is also urged on the court that the remarks of justice Matthews, when he speaks of what is now to be considered as "Indian country," should control the decision of this court. In my judgment, the case of Crow Dog and the case at bar are not parallel cases. The remarks of justice Matthews, when he speaks of "Indian country," are most general; while, on the other hand, as I have before stated, there are four decisions of the United States district court of Oregon, in which that most learned and able judge distinctly holds that Alaska is not "Indian country."

Therefore, as far as this court is controlled in the decision of this question by decided cases, those decisions of judge Deady, which are directly on the question, and which certainly are of the highest authority, should, in my judgment, have far more weight with the court in determining this question than the remarks and general language of justice Matthews, when considering whether or not the territory of Dakota was "Indian country."

Again, the fact that the revised statutes have omitted all definition as to what is now "Indian country," is important in considering this question. It would seem as if it was an indefinite term, especially when to find what constitutes such country you have to refer back to the original act of 1834. Prior to 1862, section 20 of the Intercourse Act of 1834 contained the words "an Indian in the Indian country;" but by the act of February 13, 1862, volume 12, statutes, 339, the words "any Indian under the charge of any Indian superintendent or agent," were substituted. This would seem to show that the term "Indian country" was no longer expressive, was not definite enough to be continued in the statutes.

That certain districts of country are to be considered as "Indian country," there can be no doubt. The opinion in *ex parte* Crow Dog defines such country, though possibly in a general way. But can it be said that, in the absence of any precise definition defining such country, considering, also, that the term has been dropped from the revised statutes, and that the words "Indian country" were also dropped from section 20 of the act of 1834, and the words "Indian agent" substituted; considering, also, that the only definition is that contained in the first section of the act of 1834; can it, then, be said that this territory, which was not embraced within the definition in the first section of the act of 1834 (as was distinctly held by the district court of Oregon), is, notwithstanding, "Indian country." If it is, it must be because the definition by the court in *ex parte* Crow Dog, as to what is now "Indian country," has so extended the original definition that the territory of Alaska is now included. In my opinion, the definition of the court in Crow Dog's case does *not extend* the original definition; and as Alaska was *not* included in that, it is not "Indian country," so declared by law.

The motion to discharge the prisoner, on the ground that this court has no jurisdiction, is, therefore, denied.

UNITED STATES v. KIE.

May Term, 1885.

MURDER AND MANSLAUGHTER.—The distinctions between murder, in the first and second degree, and manslaughter, stated, and commented upon.

INDICTMENT for murder. The instructions state the facts.

MCALLISTER, J. Gentlemen of the jury: The prisoner at the bar, Charles Kie, was indicted by the grand jury of this district

and thereby charged with the crime of murder, by purposely and of deliberate and premeditated malice, killing one Nancy, on the first day of September, 1884, by inflicting mortal wounds with a knife, in and upon the body of the deceased, of which wounds it is alleged she instantly died.

To the indictment found by the grand jury, the prisoner has pleaded not guilty, and you are, under your oaths, and the instructions of the court as to the law, called upon to decide from the evidence, by your verdict, as to his guilt or innocence of the crime charged against him. The duty you are to perform is the most important and sacred of any that falls within the province of jurors, important not only to the prisoner, but also to the protection, safety and well being of the people of this territory.

In cases of the nature of the one now under consideration jurors are by law made judges of all the facts given in evidence, as well as of the credibility of the witnesses who testify. On your deliberation you will be careful not to take into consideration any fact or circumstance you may have heard without the walls of this court room. Consider only the evidence adduced during the progress of this trial, that justice may be done to the people of this territory and to the prisoner.

Under the indictment, if, in your opinion, from the evidence you are justified in so doing, you can find the prisoner guilty either of murder in the first degree, murder in the second degree or of manslaughter.

Murder in the first degree, murder in the second degree, and manslaughter are by the laws of this territory defined as follows:

"If any person shall purposely, and of deliberate and premeditated malice, kill another, such person shall be deemed guilty of murder in the first degree."

"If any person shall purposely and maliciously but *without deliberation* and *premeditation* kill another, such person shall be deemed guilty of murder in the second degree."

"If any person, shall without malice, express or implied, and without deliberation, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, voluntarily kill another, such person shall be deemed guilty of manslaughter."

In order to make the killing either murder or manslaugther, it is requisite that the party die, within a day and a year after the stroke received, or the cause of death administered. In order to make the killing murder in the first degree, it must have been done purposely and of deliberate and premeditated malice. In order to make the killing murder in the second degree it must have been done purposely and maliciously, but without deliberation and premeditation. In order to make the killing manslaughter it must have been done without malice express or implied, and without deliberation, upon a sudden heat of passion, caused by provocation apparently sufficient to make the passion irresistible.

The statute also provides that there shall be some other evidence of malice than the mere proof of killing, to constitute murder in the first degree; and deliberation and premeditation when necessary to constitute murder in the first degree, shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood, and not hastily upon the occasion. Deliberation is that act of the mind which examines and considers whether a contemplated act should or should not be done. Premeditation is when the intention to do an act has been formed before the attempt to execute it.

Therefore, gentlemen, if you find that the prisoner committed this crime purposely and of deliberate and premeditated malice, and that the malice is shown by other evidence than the mere proof of the killing, and that the deliberation and premeditation are shown by proof that the design was formed and matured in cool blood and not hastily upon the occasion, as if by poisoning or lying in wait, you will find the prisoner guilty of murder in the first degree.

If you find that the prisoner committed this crime purposely and maliciously but without deliberation and premeditation, you will find him guilty of murder in the second degree.

If you find that the prisoner committed this crime without malice, express or implied, and without deliberation, but upon a sudden heat of passion caused by provocation apparently sufficient to make the passion irresistible, you will find him guilty of manslaughter.

If you find, gentlemen, that the deceased did not come to her death within the time above stated at the hands of the prisoner, you will find a verdict of not guilty.

If you have any reasonable doubt as to the guilt of the prisoner, or to any of the elements that constitute murder in the first degree, you will find him not guilty of murder in the first degree, and if you have any reasonable doubt as to any of the elements that constitute murder in the second degree, you will find him not guilty of murder in the second degree, and if you have any reasonable doubt as to any of the elements that constitute manslaughter, you will find him not guilty of manslaughter. In other words, gentlemen, the prisoner is entitled to the benefit of any reasonable doubt as to any of the elements that constitute any of the crimes above named.

In the event of your agreeing upon a conviction of the prisoner, you will state in your verdict, if he is guilty of murder in the first degree, murder in the second degree, or guilty of manslaughter. If he be not guilty of any of the offenses mentioned, your verdict will be "not guilty."

In determining the credibility of witnesses you can take into consideration their appearance and deportment when testifying; the probability of the truth of their statements, independently of or in connection with other evidence adduced; their friendly or hostile feelings toward the prisoner; to what extent they are contradicted, as well as their means of knowledge; and you can judge of and test their credibility according to your best knowledge of the laws gov-

erning human action. You will carefully consider all the circumstances of the case as detailed in the evidence, and apply to them the principles of law I have given to you. Your deliberations should be calm and serious, and you should not be influenced by prejudice or passion.

The case is submitted to your careful deliberation.

SUPREME COURT OF ARIZONA.

DOWLING *v.* HUNT.

Filed July 2, 1885.

ACTION ON CHECK—DEMAND AND NOTICE MUST BE ALLEGED.—In the complaint against the drawer of a bank check or bill of exchange, it is necessary to aver either demand and notice to the drawer of non-payment, or such facts as would excuse demand and notice.

APPEAL from the district court of Pima county. The opinion states the facts.

Haynas & Stylas, for the respondent.

J. A. Anderson, for the appellant.

PINNEY, J. This action was brought to recover upon a bank check alleged to have been given by appellent to respondent on the Guarantee Bank of Philadelphia, about the month of March, 1883. The complaint alleges that the check was presented for payment about April 1, 1883, and that payment was refused by the bank. Appellant being a non-resident, and the complaint alleging that he has property in this territory, the action is brought here. There was no appearance in the court below on the part of defendant. Judgment was taken by default, and the case is brought up on the judgment roll. It is claimed by counsel for appellant that the complaint fails to state a cause of action, for the reason that the complaint fails to allege notice to the drawer of presentment and non-payment. Under our practice, if the complaint fails to state a cause of action, a recovery and judgment cannot be sustained. The giving of a check on a bank transfers at once the amount of funds called for by the check from the drawer to the drawee, when the drawer has funds at the bank, and if the bank refuses to pay for any cause, the drawer is entitled to notice so he may enquire into the cause of such refusal.

In a complaint against the drawer of a bank check or bill of exchange, so called, it is necessary to aver either demand and notice to the drawer of non-payment or such facts as would excuse demand and notice: Shultz *v.* Depuy, 3 Abb. Pr. Rep., 252.

We are of the opinion that the complaint fails to allege facts sufficient to constitute a cause of action, and for this reason the judgment will be reversed and cause remanded.

HOWARD, C. J., and FITZGERALD, J., concurred.

SUPREME COURT OF COLORADO.

KNOTH v. BARCLAY ET AL.

Filed May 12, 1885.

PETITION FOR REHEARING—OBJECTION WHEN WAIVED.—An objection that the bill of exceptions does not purport to contain all the evidence, will be deemed waived and not considered on a petition for a rehearing, if the objection were not raised prior to the original submission of the case.

REHEARING DENIED for the reasons stated in the opinion.

PETITION for a rehearing. The prior opinion is reported in 6 West Coast Rep., 582.

L. W. Daliff and *Tilford & Gilmore*, for the plaintiff in error.

B. L. Carr, for the defendants in error.

BY THE COURT. Each and every matter presented upon this rehearing, save one, was fully and carefully examined in preparing the opinion heretofore filed. We are still satisfied with the correctness of the views therein expressed, and deem any further argument thereof unnecessary.

The question which was not then considered relates to the sufficiency of the bill of exceptions. Counsel now for the first time urge the proposition that the bill does not "*purport* to contain all the evidence," and therefore the sufficiency of the proofs could not be inquired into. We do not feel called upon to determine whether or not the defect suggested actually exists. If counsel's idea that the objection is well taken be correct, in our judgment it has been waived. The cause was argued fully *upon the evidence* by both sides; the objection now urged was entirely ignored. We were induced to investigate the whole case upon the theory that the entire evidence was before us. Under these circumstances we think it is too late at this time to take advantage of the alleged defect. Such defect, if it exists, counsel had the privilege of urging or not, as they chose. From their conduct we were justified in presuming that they elected to waive it.

It is the duty of counsel to present all questions upon which they rely, in their briefs and arguments in the first instance; and the court in reviewing the cause does not usually go beyond the subjects to which its attention is thus invited. It would be obviously unfair to permit the presentation of such questions as the one now before us, at this stage of the proceedings. Counsel are not permitted to present part of their case at the formal submission, and the remainder upon the petition for rehearing. If they have discussed all the errors or defects upon which they rely, but after the submission some new matter or point bearing upon such errors or defects be discussed, or if it is believed that the court has overlooked something material to a correct conclusion therein, a petition for rehearing is in order.

The foregoing view is in accord with the general practice hitherto prevailing in this court; it is not in conflict with the declaration

made on the subject, in Parks v. Wilcox, 6 Col., 600. The "new matter or point essential or pertinent to the decision" there mentioned, is something bearing upon the questions presented at the formal submission of the cause; it is not an error by defect in the proceedings below disclosed by the record, which should have been insisted upon, but which counsel have seen fit to ignore in the presentation of the cause, upon its regular submission in this court.

While the whole matter is in the sound discretion of the court, the foregoing is the general rule; exceptions may be made, but only for cogent reasons, growing out of unusual circumstances.

The rehearing is denied.

QUIMBY ET AL. *v.* BOYD ET AL.

Filed May 12, 1885.

REHEARING DENIED for the reasons stated in the opinion.

PETITION for a rehearing. The prior opinion is reported in 6 West Coast Rep., 171.

N. J. Sharman, for the appellants.

Markham, Patterson & Thomas, for the appellees.

BY THE COURT. Upon consideration of the petition for rehearing of this cause, and the points urged in the oral arguments thereon, the court is of opinion that the application should be denied.

As stated in the opinion, the only question about which we entertained any doubt, was the sufficiency of the testimony to support the verdict of the jury as to the performance of the annual labor required by law, for the year 1880, and we are still of opinion, in view of the whole testimony and the repeated verdicts for the plaintiffs, that we would not be warranted in reversing the cause upon that ground.

While the testimony of the plaintiffs below was mainly directed to the point, that the price paid for the work performed was a reasonable price for work of that character and extent, when done on contract, yet there was some evidence tending to show its actual value, and that it came up to the legal standard.

We are still of opinion that there is no force in the objection urged against the validity of the location of the Paymaster claim.

Rehearing denied.

KAYSER v. MANGHAM.

Filed May 12, 1885.

PARTNERSHIP—LAND PURCHASED WITH PARTNERSHIP FUNDS—TRUSTS.—Where one partner, having partnership funds in his possession, to be used for partnership purposes, without the consent of his co-partner invests the same in land for himself, taking the title in his own name, the co-partner may demand an interest in the realty purchased, corresponding in extent with his interest in the money paid therefor. And a court of equity, in such case, will recognize the resulting trust, even though the partner thus appropriating the partnership funds, intended to account therefor upon final settlement, and was innocent of any fraudulent intent.

REHEARING DENIED, for reasons stated in the opinion.

PETITION for a rehearing. The prior opinion is reported in 6 West Coast Rep., 461.

Luther S. Dixon, J. W. Mills and *A. R. Bushnell,* for the appellant.

Charles E. Gast, for the appellee.

HELM, J. Where one partner, having partnership funds in his possession to be used for partnership purposes, without the consent of his co-partner, invests the same in land for himself, taking title in his own name, the co-partner may demand an interest in the realty purchased, corresponding in extent with his interest in the money paid therefor. And it is probably true that in such case a court of equity will not hesitate to recognize the resulting trust, even though the partner thus appropriating the trust fund intended to account therefor upon final settlement and was innocent of any fraudulent purpose. The ordinary principle in equity relating to the investment of trust funds by the trustee is held applicable to such cases; and a co-partner has the right, at his election, when there are no intervening innocent purchases or incumbrances to follow the money, and reclaim his proportionate interest in the land.

It is safe to say that the foregoing general rule is now well established; it is highly beneficent and wholesome, and we make no issue with counsel concerning its existence. But, in our judgment, it does not cover the case at bar, and its application thereto would be unwarranted.

The reasons for the foregoing rule are that the trust fund is in the hands of the trustee or partner for certain specific purposes; and when he used it without the consent of the *cestui que trust* or co-partner in the purchase of realty for himself, he is guilty of a breach of trust; there is a diversion of the trust fund to a purpose not contemplated by the conditions of the trust; and so watchful is a court of equity over the acts of trustees, and so jealous is it of the interests of beneficiaries, that it often pronounces such appropriation wrongful, regardless of intent. It says to the trustee or partner: "Your motive may be pure; you may fully intend to return the money used with a gratifying addition thereto, by way of interest or otherwise; or it may be your purpose to charge yourself, in a final settlement, with the full amount appropriated, regardless of the outcome of the investment; but you had no right to divert the money

from the fund to which it belonged and the purpose for which it was placed in your hands, and in so doing you were disloyal to the obligations imposed by virtue of the position you occupy. This being true, the person upon whom you have inflicted the wrong may elect whether he will receive repayment of the money or whether he will follow it into the property bought and held by you."

But the foregoing circumstances do not exist in the case at bar. Mangham did not thus wrongfully divert partnership moneys in his hands. He did not take one thousand five hundred dollars from the partnership treasury, and, adding eighteen thousand five hundred dollars of his own, purchase the property; neither can it be said that he accomplished this result by indirection. The one thousand five hundred dollars had been used by the partnership for a partnership purpose; it had been invested in good faith, with the consent of plaintiff, for the attainment of a collateral object, directly in the line of the partnership business or adventure; it secured from the owner of the property the extension of time, for which it was paid; and in accordance with the terms of its payment, this extension having expired, it had practically become forfeited, and entirely lost to the firm; the firm itself virtually passing out of existence by reason of the failure of the partnership adventure.

How can it be said that Mangham, when he bought under these circumstances, diverted the money from the legitimate partnership uses. Instead of wrongfully diverting partnership moneys under the view adopted by us, he redeemed and saved to himself and co-partner that which had previously been expended by the partnership and forfeited.

It must be borne in mind that we have heretofore declared Mangham's conduct throughout the entire transaction, so far as the record shows, void of any appearances of actual bad faith; and the question before us is, was he through his purchase of the mine guilty of such a *constructive* fraud as in and of itself produced a constructive or resulting trust.

It is apparent from the foregoing that the reasons for applying the doctrine of resulting trusts to the investment by a partner for his private advantage of partnership funds, do not exist in this case; and the reasons for the rule failing, the learned counsel who urges this rehearing with such skill will be among the first to say that the rule itself should not be applied.

It might perhaps be truthfully said that Kayser's conduct after learning of the purchase by Mangham was such as to estop him from now claiming an interest in the mine, had he possessed the right in the first instance. Aside from the question of laches in bringing this suit, which was considered in the opinion heretofore filed, a court of equity might perhaps construe his language and acts into an election not to claim any interest in the mine. But we prefer now as before, to rest our conclusions upon other, and in our judgment stronger, grounds.

The rehearing is denied.

PEOPLE EX REL. WHITTEMORE v. RYALLS.

Filed May 29, 1886.

ATTORNEY WRONGFULLY WITHHOLDING PROPERTY OF CLIENT—DISBARMENT.—An attorney who receives, in his official capacity, any money or property belonging to his client, and, upon demand therefor and tender of his fees, refuses or neglects to pay over the same, will be disbarred, under section 74 of the general statutes, although, after the institution of proceedings for disbarment, he may have paid the money wrongfully withheld.

RULE to show cause why an attorney should not be disbarred. The opinion states the facts.

Theo. H. Thomas, attorney general, and *Horace G. Benson,* for the people.

No appearance for the respondent.

BY THE COURT. This proceeding is instituted under section 74 of the general statutes. The substance of this statute briefly stated is that whenever an attorney shall receive in his official capacity any money or property belonging to his client, and shall upon demand therefor and tender of fees, refuse or neglect to pay over the same, any person interested may apply to the supreme court for a rule requiring such attorney to show cause why his name should not be stricken from the roll of attorneys; and if at the trial the truth of the charges made be sustained, the court shall cause the name of such attorney to be stricken accordingly.

After service of the rule in this case as required by law, respondent paid the money wrongfully withheld, also the costs of this proceedings. It seems to have been understood that the proceeding would then be dismissed by relator; as respondent made no answer, took no steps to defend against the charge and departed from the state.

We decline to discharge the rule, and have heard the evidence touching the matters averred in the petition.

It seems to have been assumed in the present and several similar cases recently brought in this court, that the statute mentioned was framed to aid clients in collecting moneys thus wrongfully withheld by their attorneys.

Doubtless the proceeding will tend to accomplish this purpose, for two reasons.

First. An attorney must be lost to all sense of honor as well as professional pride, who would not thereby be stimulated to relieve himself from the odium attaching to his breach of trust; and

Second. Payment of the money, even though under an influence akin to coercion, would probably have some bearing upon the decision of this court on the question of disbarment.

But we do not conceive that the statute referred to was adopted for the purpose of affording an additional private remedy for the collection of the moneys mentioned. In our opinion, the principal object of the legislature was to place in the hands of this court an additional means whereby the profession may be purged of unworthy members, and litigants generally be protected from imposi-

tions practiced by such persons. As supporting this view it may be suggested that, without the statute, at common law the client possessed quite as effective a remedy for the wrong under consideration; he might obtain from the court a rule requiring the attorney to pay over the moneys kept back; and upon disobedience of the rule the proper practice was not to move for disbarment, but to procure an attachment for the contempt: Weeks on Attorneys-at-Law, sec. 97. Under this common law proceeding, as declared by Hallett, C. J., the attorney so attached might purge himself by satisfying the demand, but the statute is otherwise. The learned judge further says: "By section 7 it is provided that the judgment of the court shall stand until the court shall authorize the attorney again subscribe the roll, and I do not perceive that he may obtain such permission by payment of the money merely:" Concurring opinion *In re* Brown, 2 Col., 558.

The evidence taken in the case before us demonstrates that respondent is guilty of the offense referred to in the statute, and charged by the petition; we think that he improperly neglected and refused to pay over the money of his client, the relator herein. Interpreting the statute as we do, it therefore becomes our duty to pronounce the judgment of disbarment.

In so far as the foregoing views may conflict with those of the majority of the court in the case mentioned, 2 Col., 553, that decision is modified.

The rule to show cause heretofore issued herein is made absolute; and it is accordingly adjudged that the name of respondent, John V. Ryalls, be stricken from the roll of attorneys who are permitted to practice in the courts of this state.

PEOPLE EX REL THOMAS *v.* GODDARD.

Filed June 17, 1885.

PUBLIC OFFCERS — BRIBERY OF ELECTORS—DISQUALIFICATION OF OFFICER. — Conceding that the statute of 5 and 6 Edward vi., ch. 16, disqualifying a person from holding an office who has resorted to corrupt means to obtain it, was adopted by the territorial legislature of 1861, and that it was continued in force by section 1 of the schedule to the state constitution, such statute was subsequently repealed by the act of March 8, 1877, entitled "An act regulating elections and repealing all territorial acts upon the subject."

THE SAME—CONSTITUTIONAL LAW —SUBJECT EXPRESSED IN TITLE OF ACT.—The provisions of such act of March 8, 1877, specifying the qualifications of those to be elected, and of the electors, is germane to the subject expressed in the title of the act, and, consequently, not repugnant to that clause in the constitution prohibiting the passage of bills containing more than one subject, and making void so much of any act as shall not be expressed in its title.

QUO WARRANTO. The opinion states the facts.

Theo. H. Thomas, attorney general, Luther S. Dixon and *Thornton H. Thomas*, for the people.

Chas. H. Thomas, J. B. Bissell, Joseph W. Taylor, Clinton Reed, Wm. Kellogg and *Chas. I. Thomson*, for the respondent.

BECK, C. J. The information filed by the attorney general charges that the respondent, while a candidate for the office of judge of the fifth judicial district, entered into seven corrupt contracts, with as many different electors of said district, and that all of said contracts were made and entered into by the respondent for the purpose of securing his election to said office. It is charged that the respondent contracted separately with all these several individuals, to the effect that, in the event of his election, he would appoint each one of them to the office of clerk of the district court of Lake county, in said district, in consideration that each one of them should use all his influence and expend large sums of money in inducing and influencing electors to vote for him, and that in pursuance of said contract, said persons expended divers sums of money in influencing a large part of the electors of said judicial district to vote for the respondent for said office.

It is further charged that upon the making of said contracts, and each and every one of them, the respondent immediately became a disqualified and disabled person in law to have, occupy, or enjoy said office.

The truth of these several charges is admitted by the respondent's demurrer to the information. It only remains for us, therefore, to determine whether the misconduct charged, in procuring the office, disqualified the respondent to hold and administer the same after his election.

It must be apparent to every citizen that if such disgraceful conduct as is alleged in this information does not, *ipso facto*, disqualify one from administering an office procured by the use of such means, the law is defective in this particular.

We desire, in the first place, to compliment the counsel engaged in the presentation of this case to the court, for the able manner in which they discussed the several questions arising upon the demurrer. The arguments, both on part of the people and the respondent, displayed learning and research, and they very materially aided the court in its investigation of the subject.

We have made a careful examination of the various cases cited, so far as the books were accessible, and we are free to say, that but for the existence of a statute, referred to in the oral argument but not discussed in the briefs, the theory of the prosecution could and would be sustained. But conceding that the statute of 5 and 6 Edward vi., ch. 16, was adopted by the territorial legislature in 1861, and that it was continued in force by section 1 of the schedule to the state constitution, and that the effect of this statute is to disqualify a person from holding an office who has resorted to corrupt means to obtain it, yet we are reluctantly forced to the conclusion that the first state legislature repealed the statute, so far as the present case is concerned. That body passed an act entitled "an act regulating elections, and repealing all territorial acts upon the subject." It was approved March 8, 1877. Section 4, of that act, provides as follows: "Every qualified elector shall be eligible to

hold any office for which he is an elector, except as otherwise provided by the constitution."

The constitution enjoins upon the legislative assembly the duty of passing laws to preserve the purity of the ballot, but that instrument does not make the specific misconduct charged in the information a disqualification to hold office.

We have, then, an old English statute, which, if in force as to the case presented, would authorize a judgment of ouster upon the facts stated in this information; but we have also a state statute, passed since the adoption of the former, the effect of which is to declare the respondent duly eligible, though guilty of the acts charged, such acts constituting a misdemeanor only, which does not disqualify him as an elector. We refer to section 1,227 of the general statute, which operates to repeal section 875 thereof in this particular. Section 4 of the act of 1877 is irreconcilably inconsistent with the English statute in the particular mentioned; the consequence is that the later act must prevail. We know of no rule of construction applicable to the case which will avoid this result.

The general rule that a general statute does not repeal a special or particular statute does not apply, for the reason that the statute of Edward vi. cannot be said to be either a special or particular statute. Had it been of such a nature it would never have been brought to the shores of this continent by the early colonists from England, nor would it, as a part of the common law, ever have become the rule of decision in any part of this country. It was only the public laws of the mother country, and those of a general nature, which found their way into the jurisprudence of this country. This point was made by the relator upon the argument, and authorities were cited to show that the statute of Edward vi. was regarded as a public law in England; that the judges *ex officio* took notice of it, and because it was a general law and not local or special, it, with other general laws of that country, became the rule of decision on this side of the Atlantic prior to its adoption by state conventions, and prior to its enactment by state legislatures.

It was this characteristic that brought it within the adopting act of the Colorado legislature of 1861, which declared that the common law of England, so far as the same was applicable and of a general nature, and all acts of the British parliament, made in the aid of or to supply the defects of the common law prior to the fourth year of James i. with certain exceptions, and which were of a general nature and not local to that kingdom, should be the rule of decision here, and should be considered of full force until repealed by legislative authority.

It is such an act as is clearly susceptible of repeal by implication. The inconsistency between its provisions and those of section 4 of the act regulating elections, is patent, and if the latter section is valid, it undoubtedly works a repeal of the English statute, so far as the facts of this case are concerned.

The only source of doubt as to the validity of the section in question, is whether it is germane to the title of the act in which it appears. The question is a close one and not free from doubt.

Our constitution prohibits the passage of bills containing more than one subject, and makes void so much of any act as shall not be expressed in its title: Const., art. v., section 21. Provisions of this character are usually inserted in constitutions, the object being, as was stated by the supreme court of Iowa, to prevent the union, in the same act, of incongruous matters, and of objects having no connection or relation: State v. County Judge, 2 Ia., 280. But Mr. Cooley says the general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title: Cooley's Const. Lims., p.* 144. This learned author further says, in the same connection: "To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be measurable, but would actually render legislation impossible. Courts and law writers have said that the generality of the title of a bill is no objection to it, and that it is not required that the body of a bill shall be a repetition of its title."

The lamented Thatcher, when chief justice of this court, in commenting upon the constitutional provision referred to, used the following language, which has since been accepted as the true interpretation of the provision: "That under our constitution, so much of any act as is not directly germane to the subject expressed in the title, is without force; that the provision, instead of being only a rule of the general assembly to regulate their procedure, is a mandatory declaration of an essential condition to the validity of legislative enactments:" C. & G. R. Co. v. The People, 5 Col., 40.

If subjects, diverse in their natures, having no necessary connection with each other, be joined together in a bill, or subjects be inserted of which the title gives no intimation, it is an imposition upon the legislature, and the public as well, and constitutes the very evil against which the constitution sought to guard.

But as we said in Golden Canal Company v. Bright, 5 West Coast Rep., 805, "this constitutional inhibition must have a reasonable construction. It is enough if the bill treats of but one general object, and that object is expressed in the title. To require that each subdivision of the subject, each and every of the ends and means necessary or convenient for the accomplishment of the object, must be specifically mentioned in the title, would greatly impede and embarrass legislation."

The act in question relates to the general subject of elections, and to say that the qualifications of those to be elected, as well as the qualifications of the electors, is not germane to the subject might produce disastrous consequences. If such a ruling should be made it might serve as a precedent for annulling the act in other essential particulars, certainly not more germane to the title than this one. The act has been in force for eight years, and valuable rights have

accrued under it. To declare an act of the legislature unconstitutional is always a delicate duty, and one which courts do not feel authorized to perform unless the conflict between the law and the constitution is clear and unmistakable. We are not prepared to say that the qualification for elective offices is so foreign to the title of the act of March 8, 1877, or so foreign to the ostensible purpose of that statute as to make it obnoxious to the constitutional provision referred to.

It must be admitted that the insertion of this rule of qualification was unfortunate, and that the provisions of the statute of Edward vi. are much more salutary upon this point, and ought to receive legislative recognition.

The demurrer will be sustained.

POMEROY *v.* ROCKY MOUNTAIN INSURANCE CO.

Filed June 17, 1885.

LIFE INSURANCE—CONDITION AGAINST INTEMPERANCE—WAIVER—ESTOPPEL—KNOWLEDGE OF AGENT.—The fact that an assured, at the time of his insurance, was intemperate to such a degree as to impair his health, avoids the policy if the same contain a condition that if the party insured should become so far intemperate as to impair his health, the policy should be void; and the knowledge of such fact, by the agent of the company, will not operate to estop it from relying upon the violation of such condition, as a defense to an action on the policy, or be regarded as a waiver thereof, if, at the time of the execution of the policy, the party in whose favor the same was issued also knew of such fact.

ERROR to the district court of Arapahoe county. The opinion states the facts.

Stuart Bros., for the plaintiff in error.

W. W. Cover and *B. F. Harrington*, for the defendant in error.

HELM, J. A judgment was rendered in the court below against plaintiff, upon demurrer to his amended complaint, to reverse which this writ of error was sued out. All of the material facts well pleaded in the complaint are, therefore, admitted. One of the several matters argued is in our judgment decisive of the case, and we shall, therefore, consider no others. The complaint avers *inter alia* the following facts, viz., that a condition in the certificate of insurance or policy was that if the party insured should become so far intemperate as to impair his health, or induce delirium tremens, the certificate should be void; that at the time of the renewal of the policy the assured was intemperate, and that his intemperance was such as to impair his health; but that Johnson, the agent, who renewed the policy, was familiar with the habits of the deceased, and then had full knowledge of the latter's intemperance and the impaired health resulting therefrom. The complaint also avers that the only ground of refusal to pay the amount of the policy was, that "the deceased either died from delirium tremens or became so in-

temperate as to impair his health;" likewise, that deceased did not die of delirium tremens.

The question presented by these averments and the demurrer thereto is this: Was the condition in the certificate regarding intemperance waived? or, putting it in another way, did the knowledge of Johnson and his acts in the premises operate to estop the company from relying upon the violation of this condition as a defense?

We are disposed to treat the revival or renewal of the certificate after its forfeiture for non-payment of dues as similar so far as the above question is concerned, to the making of the contract of insurance in the first instance; hence we are not to consider the waiver of a cause of forfeiture occurring after the contract is made, but the waiver of a material condition therein at its inception. This distinction should be borne in mind because here is a marked difference in law between the act of the insurer in receiving premiums, assessments or dues, with knowledge of the subsequent violation of a material condition which was originally placed in the policy solely for his benefit, and the waiving of such condition at the inception of the contract; it, the condition, nevertheless being inserted into the writing which is executed and accepted by the parties.

The plaintiff in this case, who is the assignee of the policy, and who procured the renewal, must be presumed, notwithstanding his disclaimer on the subject, to have known the contents thereof when it was reviewed or renewed; no fraud or deception being practiced upon him, the law will not permit him to say that he was ignorant of the conditions contained in the contract.

We must assume also, that he, as well as the agent, Johnson, was aware of the assured's impaired physical condition when the contract was renewed, there being no averment in the complaint to the contrary.

It is therefore true that plaintiff paid the premium for the revival of the policy, and took the assignment thereof with knowledge of the condition mentioned, and also with knowledge of the fact that the cause of forfeiture thereunder already existed, and went into the transaction with his eyes open; he was not deceived or misled as to the condition question; nothing is disclosed by the complaint to show that it was alluded to or discussed by himself or the agent. He now insists that solely by reason of Johnson's knowledge of the assured's intemperance and impaired health, his principal is estopped from asserting the forfeiture.

It is clear that a gross fraud was practiced upon the company. This is one of the leading grounds of forfeiture; it is a matter of vital importance by way of protection to the insurer; this condition is of such a nature that the presumption of waiver should rest upon strong and unusual circumstances. We would about as soon expect a fire insurance company to waive the condition rendering a policy void, if the fire occasioning the loss be voluntarily set by the owner of the property for the purpose of obtaining the amount of the risk.

Plaintiff, as a man of ordinary good sense, must have known that no renewal of the policy would have been permitted, had the company been actually advised of the existing circumstances. If he was acting in perfect good faith he should at least have insisted on striking this condition from the contract. The situation here disclosed is wholly unlike that existing under certain of the decisions cited by counsel for plaintiff in error, where the assured or the plaintiff was the innocent victim of deception practiced by avaricious and unscrupulous agents.

As suggested already, a fraud was practiced, or attempted to be practiced, upon the company by its agent. If plaintiff and the agent actually conspired together to consummate this fraud, of course the former cannot recover. If the agent alone possessed the wrongful intent, and such, probably, was the fact, plaintiff, through his own negligence, became the instrument by which the fraudulent contract was made.

It would seem that in procuring the renewal plaintiff must have relied upon one of two contingencies happening in case of the assured's decease—either that the company would not discover the fraud of its agent, or that the law would create an estoppel by reason of the knowledge of Johnson, against its relying upon this defense. In either view, he can hardly be regarded as entirely innocent Under all the circumstances here presented, we do not deem this an appropriate case in which to apply the doctrine of estoppel, or waiver through the knowledge and conduct of agents, recognized by the supreme court of the United States, and by many of the state courts of last resort.

The general rule is that parties must be held to the solemn declarations contained in their written contracts; that parol proof of matters occurring prior to, or at the time of executing such contracts, but embodied therein, will not be admitted to contradict or vary the terms thereof. We are aware that to this rule there *seem to* be exceptions, and that these so-called exceptions are sometimes recognized in insurance cases. But it is said that even then the courts do " not admit oral testimony to vary or contradict that which is in writing;" that the reception of this kind of proof rests " upon the idea that the writing offered in evidence was not the instrument o the party whose name is signed to it; that it was procured under such circumstances as estopped that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it:" Mr. justice Miller in Union Mutual Insurance Company v. Wilkinson, 13 Wall., 222.

In the case alluded to the discussion arose through a false answer to an interrogatory in the application; a question calling for the cause of the mother's death, and her age at the time, was answered by both the assured and her husband to the effect that they had no knowledge whatever on the subject; but the agent after interviewing

of bystanders, wrote the answer that she died of a fever at the age of forty years; upon the trial of the suit brought to recover the amount of the policy it was proven that the mother died at the age of twenty-three years; there was also evidence that her death resulted from consumption, but the jury did not so find. The court sustained the recovery.

As to what would have been held had it appeared that the assured and her husband, for whose benefit the policy issued, then knew the cause of the mother's death and her age at the time, we are of course not advised. When the application, which is a part of the contract as much as the policy itself, was signed, the applicant was not aware that the answer was false, having heard the statements of the party questioned by the agent, he probably believed them to be true. Besides, in writing down this answer the agent acted entirely upon his own responsibility, it is a very different case even from that where the applicant himself *innocently* gives a *false* answer to a material question, upon which answer the agent and the company rely.

By analyzing the extract above given from the decision in thirteenth Wallace, it will be seen that there must be inequitable circumstances such as substantially render the applicant himself the innocent victim of imposition or fraud; what else could prevent the use of the instrument against him or estop the other side from relying upon its contents.

We have examined the decisions cited and diligently searched for others, but have found none which rest upon facts similar to those now before us; so far as we have discovered, the doctrine of adjudicated cases would hardly warrant us in sustaining the view that a waiver of the condition under consideration took place or that an estoppel to the company's reliance upon it can be held to exist. It has been unnecessary for us to discuss generally the doctrine of estoppel, or waiver through the acts of the officers or agents of insurance companies. Neither have we deemed it important to consider the difference, in this respect, held by some courts to exist between the "old line," or stock insurance corporators, and the mutual association or company, to the latter of which classes defendant belongs. If we were to accept the view of those courts which hold to mutual companies, to the highest degree of responsibility for the conduct of their officers or agents, still we could not sustain plaintiff's position. For, as already shown, he is not before us in the attitude of one who without fault on his part is the innocent victim of imposition or misrepresentation practiced by an unprincipled agent.

The judgment is affirmed.

CAMPBELL, INTERVENOR, ETC *v.* COLORADO COAL AND IRON CO.

Filed June 17, 1885.

PARTNERSHIP—ONE FIRM UNDER SEVERAL NAMES.—Where the same persons engage in carrying on the same business in several places, under different firm names, they constitute but one partnership, and the assets of both nominal firms are equally applicable to the payment of all the creditors.

ASSIGNMENT FOR BENEFIT OF CREDITORS PASSES PROPERTY IN ANOTHER STATE.—A voluntary assignment for the benefit of creditors which is valid in the state where the owner resides, will be held to pass personal property included, the *situs* of which is in another.

THE SAME—ASSIGNMENT MUST INCLUDE ALL PROPERTY.—A voluntary assignment for the benefit of creditors, under section 68 of the general statutes, must include the entire estate of the insolvent, otherwise it is invalid. This rule applies although the property omitted from the assignment is situated in another state.

ERROR to the superior court of Denver. The opinion states the facts.

E. O. Wolcott and *A. E. Patterson*, for the plaintiff in error.

R. D. Thompson and *John W. Waldron*, for the defendant in error.

HELM, J. The cause at bar was tried in the superior court upon an agreed statement of facts. This statement is in brief as follows: Ferdinand Jensen and William M. Bliss were engaged as partners in the mercantile business at Denver, Colorado, and Deadwood, Dakota; the firm name at the former place was Jensen, Bliss & Co.; at the latter it was Jensen & Bliss.

At the hour of seven o'clock, P. M., October 1, 1884, Jensen, Bliss & Co. made an assignment of certain claims, demands, notes and accounts, aggregating in value about thirteen thousand five hundred dollars, to one Metcalf, for the purpose of paying or securing a *bona fide* firm indebtedness of twenty thousand dollars; at the same time and for a like purpose Bliss also executed to Metcalf a trust deed upon certain realty, the title of which was in the former's name alone. At the hour of nine P. M. of the said October 1, the firm executed and delivered to R. A. Campbell, as assignee, an assignment of all the partnership property "of every name and nature within the state of Colorado," for the equal benefit "of each and every of our creditors in both branches of our said business, and everywhere."

Prior to this and about September 20, 1884, the attorney of the firm was directed to draw both of the said assignments; the one to Metcalf was prepared by said attorney on said September 20, and the other four days latter, to wit.: September 24.

On the twenty-ninth day of September, without the knowledge of Metcalf, an entry was made upon the books of the firm of the transfer to him of the choses in action mentioned in the written assignment made for his benefit. At the time of the assignment to him, Metcalf knew that the other assignment aforesaid was about to be made; but the assignee, Campbell, was ignorant, when he accepted the trust, of the Metcalf transaction.

On the second and fourth days of October, 1884, the firm of Jensen & Bliss executed and delivered mortgages to certain of their

Deadwood creditors, upon their Deadwood property. Though the nature of this property is not specifically stated in the record, yet, we are sufficiently advised, to say that it was all, or nearly all, personalty.

During all of the preceding transactions both nominal firms were insolvent.

November eighth following, plaintiff, the Colorado Coal and Iron Company, being a *bona fide* creditor of Jensen, Bliss & Co., brought an action against the firm for the amount of its claim, and caused a writ of attachment to be levied upon the property in the hands of Campbell as assignee; the latter intervened in this attachment proceeding claiming the property by virtue of the assignment aforesaid.

Judgment was rendered against the intervenor, and in favor of plaintiff, whereupon the former sued out this writ of error.

It is hardly necessary to state that the question now presented for determination relates to the validity, under all of the foregoing circumstances, of the assignment to Campbell.

Since the persons constituting both firms were the same, and they were engaged in carrying on the same business in both places, there was in law but a single partnership, the fact that there were two partnership names is of no importance, and "the assets of both nominal firms are equally applicable to the payment of all the creditors:" *In re* Williams & Co., 3 Woods, C. C. R., 493, and authorities there cited.

We shall, therefore, in the discussion of this case adopt the theory that there was but a single partnership which was engaged in business at the two places mentioned; that the Colorado creditors and the Dakota creditors were equally interested in the assets, whether in Denver or Deadwood, and entitled to equal protection under the law.

It may be considered a settled doctrine that a voluntary assignment which is valid in the state where the owner resides, will be held to pass personal property included, the *situs* of which is in another state. It is said that while "an involuntary transfer of movable property abroad by process at home, does not divest the title in prejudice of creditors domiciled at the place of the actual *situs*, a voluntary transfer by the act of the owner, divests it everywhere." This is in perfect harmony with the principle that while "the *lex loci contractus* determines the validity of the contract, the *lex fori* controls the remedy:" Speed v. May, 17 Pa. St. 91, citing 6 Binney, 360, and other cases; see also Dehone *et al.* v. Foster, 4 Allen, 545, and cases cited.

We are not here concerned with the qualifications of the foregoing doctrine, such as that a contract made in one state and relating to the transfer of personal property shall not be permitted to injure the citizens of another state whose laws are invoked to carry it into effect. For, as we shall hereafter see, the injury complained of in this case is visited upon the citizens of the state where the contract is made, and it is only claimed that they should have been placed

upon an equality with those of a neighboring territory wherein part of the property is situated.

If the foregoing propositions of law are correct, it follows that Jensen & Bliss might have included in their assignment to Campbell their Dakota as well as their Colorado property, and we shall presently see that, under our statute, it was their duty to do so.

They, however, not only gave preference to Metcalf, but also made a partial assignment of their property, viz., the part thereof in Colorado, for the benefit of their Dakota as well as their Colorado creditors. Not only this, but immediately thereafter they show unreasonable favoritism by further securing their Dakota creditors with mortgages upon their Deadwood property. Bearing these facts in mind, let us briefly examine the law governing assignments of this character in Colorado.

Section 68 of the general statutes reads as follows: "Whenever any person or corporation shall hereafter make an assignment of his or its estate for the benefit of creditors, the assignee named in the deed of assignment, elected or appointed, shall be required to pay in full, from the proceeds of the estate, all moneys *bona fide* due to the servants, laborers and employees of such assignor for their wages accruing during the six months next preceding the date of such assignment, but to exceed, in no event, the sum of fifty dollars to any one person then remaining unpaid. All the residue of the proceeds of such estate shall be distributed ratably among all other creditors, and any preference of one creditor over another, except as above allowed, shall be entirely null and void, anything in the deed of assignment to the contrary notwithstanding."

We do not understand that this statute prevents a debtor in failing circumstances from preferring one *bona fide* creditor over another by securing or paying his claim, provided the security be given or payment made and accepted in good faith.

But when such preference is given by an insolvent debtor at or about the time of an attempted assignment for the benefit of creditors, and the circumstances palpably show an effort on the part of assignor and assignee to evade the statute, it cannot be said that the requisite good faith characterizes the transaction. It is then an attempt to accomplish, indirectly, that which cannot be done directly. For, if the preference were stated in the deed of assignment it would be ignored, while the assignment itself would be upheld; the assignee having control thereof would be required to distribute the proceeds of the trust estate ratably as though no such preference had been declared.

It is also clear that an assignment for the benefit of creditors generally must, under the statute, convey all of the insolvent debtor's property not exempt from execution. It would be a gross violation of the first principle of statutory construction for us to hold that such an assignment might include a part only of the insolvent debtor's estate or assets, the balance thereof remaining to be distributed as he deems best among a few favored creditors. The word "estate"

used in the statute most assuredly means all of the debtor's property which is not exempt from execution.

Does the omission to include the entire partnership assets in this assignment invalidate the conveyance as to an attaching creditor; or does the Metcalf transaction produce this effect?

Could we hold that the deed of assignment in law gave Campbell, the assignee, control of all of the partnership property, notwithstanding the limitation therein stated, and notwithstanding the conveyance to Metcalf, this question would be cheerfully answered in the negative. For we would thus be effectuating the maxim to which the statute was intended to give vitality that among creditors under such circumstances, equality is equity. But in this respect the instrument must speak for itself; the assignee can take title to only property conveyed thereby. We cannot extend the contract so as to embrace assets, real or personal, not covered by the language used, and evidently not intended by the parties thereto to be affected by the transaction. This rule of interpretation applies as well to assignments made since the statute was adopted as to those executed and delivered prior thereto.

There is no possible legal construction whereby we can say that the Dakota property was included; it is carefully excluded; and showing that its omission was not a mistake is the fact that it was almost immediately mortgaged to the Dakota creditors. Thus it appears that however we might hold as to the choses in action transferred to Metcalf, thirty thousand dollars worth of the partnership assets were reserved from the control of the assignee. This, in our judgment, is fatal to the assignment. It must fall at the suit of plaintiff, because in violation of the statutory requirements above mentioned. The primary object of the statute as already declared is to secure a *pro rata* distribution of the insolvent debtor's entire estate among all the creditors; and when property is withheld from the control of the assignee and afterwards conveyed or mortgaged to favored creditors, the fraud is as palpable as when the preference is given and received on the eve of an assignment with intent and for the express purpose of evading the statute. If the assignment must fall in the latter case it should be held void in the former also. The other branch of the foregoing interrogatory, viz., the effect upon the assignment to Campbell, of the Metcalf transaction, is not so easily answered. A fair discussion of it would compel us to determine at least two questions as to which the courts are not in harmony. In view of the fact, however, that the foregoing conclusion is decisive of the proceedings in this court, it is not necessary that we should further prolong this opinion. We shall therefore presume counsel's indulgence in declining to do so.

The judgment is affirmed.

SUPREME COURT OF OREGON.

SMITH *v.* SHATTUCK.

Filed June 10, 1885.

TAX DEED—INSUFFICIENT DESCRIPTION—COLOR OF TITLE—STATUTE OF LIMITATIONS.—A tax deed, although insufficient to pass title, by reason of an imperfect description of the premises, is admissible in evidence to show that the person claiming under it was holding under color of title, and, in connection with proof of possession, is competent evidence to establish the defense of the statute of limitations.

COURT CANNOT DIRECT VERDICT.—Under the provisions of the civil code, the court has no power to direct the jury to find a verdict in a certain way.

FINDING OF JURY—REVIEW OF ON APPEAL.—When there is any evidence, however meagre, calculated to prove any fact in a case, it is the province of the jury to weigh it and determine its effect; with such determination the supreme court has no right to interfere.

TAX DEED—SUFFICIENT DESCRIPTION.—A description of property, in a tax deed, as "thirty-seven and one-half acres of land in sec. 11, township 1 south, range 1 east, known as Smith's farm, in Multnomah county, Oregon," is sufficiently definite to pass title, if the identity of the land can be ascertained.

APPEAL from Multnomah county. The opinion states the facts.

Killen & Moreland, for the appellant.

James J. Kelly, for the respondent.

THAYER, J. This appeal is from a judgment of the circuit court for the county of Multnomah. The appellant commenced an action in said court to recover the possession of certain real property, consisting of a tract of thirty-seven and one-half acres of land, situated in said county of Multnomah. The complaint is in the usual form to recover the possession of real property. The respondent interposed several defenses, viz.: First, That the land was owned by one I. B. Smith, and in his possession at the time of his death, September 3, 1882, and that the respondent was the administrator of the said Smith. Second, That on the thirteenth day of June, 1868, the land was sold by the sheriff of Multnomah county for taxes due from the appellant, which were delinquent, and was purchased at said tax sale by said I. B. Smith; that no redemption thereof having been had, a deed was duly executed by the sheriff of said county to the said I. B. Smith, on the third day of July, 1868; that said deed was duly recorded in the office of the clerk of said county, on the second day of November, 1870, since which time said I. B. Smith was in the actual possession of said tract of land until the time of his death, and that no action, suit or proceeding for the recovery of said land was commenced within three years from the said second day of November, 1870, the time of recording the tax deed. Third, That neither the appellant, his ancestor, predecessor or grantor, was seized or possessed of the premises within ten years prior to the third day of September, 1882, when said I. B. Smith held and possessed the same adversely to the pretended title of the appellant for more than ten years before the time of his death, under a claim of title in fee simple.

The appellant filed a reply, in which he denied the several defenses set up by the respondent, and the issues so formed were tried by

the court, and a jury duly empaneled. The appellant, upon the trial, gave in evidence a deed executed by Gideon Tibbetts and wife, to himself, dated March 24, 1858, of the land in controversy; also a patent from the United States to the said Gideon Tibbetts and wife, bearing date January 31, 1873, of a larger tract of land, and which included the land in dispute. The said deed to appellant contains full covenants of assurance, and the patent was issued under the Oregon donation law. The premises in question are a part of the said donation claim that enured under the said law to Mrs. Tibbets. The respondent, upon his part, gave in evidence the tax deed alleged in his answer. When it was offered in evidence counsel objected to its introduction, upon the grounds that it was incompetent and immaterial, as it contained no sufficient description of the land. The description in the deed is as follows: "Thirty-seven and one-half acres of land in sec. 11, township 1 south, range 1 east, known as Smith's farm, in Multnomah county, state of Oregon." The deed also contained a recital as follows: "The said property having been duly assessed for the fiscal year, 1865, to the said Y. A. Smith." When the objection was made to the introduction of this deed, the respondent's counsel stated to the court that he would show that in the month of June, 1866, said land was known as Smith's farm, in the neighborhood where it is situated, and, thereupon, the court overruled the objection, and said deed was read in evidence to the jury.

Gideon Tibbetts, having been called as a witness, testified, that he was very well acquainted with the land; that it was a part of the donation land claim of himself and wife; that his claim was in sections 10, 11 and 12, mostly in section 11, in the township and range aforesaid. The witness was then asked if he knew where a tract of land lies described as thirty-seven and one-half acres of land in section 11, township 1 south, range 1 east, known as Smith's farm, to which he answered: "I know of a tract of that size that Smith pretended to own; he paid me for it; we always called it Mr. Smith's land; that piece of ground." Said witness, in answer to another question asked by the respondent's counsel, testified: "This piece of land was known there as Smith's land," referring to June 6, 1866, "and it is known to-day, I believe, as that. I have never heard of any other tract of land in that section that has been known as Smith's land, or as the Smith land." This evidence was taken against the objection of appellant's counsel, as being incompetent and immaterial. And there was no other evidence tending to show that the premises in controversy were, in 1866, or at any other time, known as Smith's farm. Said witness also testified that as much as fifteen years ago I. B. Smith, deceased, occupied a house which had been moved on the land in controversy for a school-house, but never used for such purpose; that I. B. Smith, deceased, slept in it and cooked there, and that some wood-choppers cutting wood on the land in his employ, for a time, slept there and cooked their meals in it. He also testified, that for the last five or six years of his life I. B. Smith resided on the land in controversy, in a small house built by

himself, and had a small piece under cultivation. Another witness, John Campbell, testified that in 1878 or 1879, he, at the request of I. B. Smith, surveyed the land in controversy for him, and that he, after that time and until his death, resided upon it. And there was no other evidence tending to show adverse possession of the land in controversy by I. B. Smith. Respondent then offered in evidence a deed of Gideon Tibbetts and wife to Isaac B. Smith, dated the seventeenth day of March, 1874, for the land in controversy, to the introduction of which the appellant objected, because it was incompetent and irrelevant, which objection the court overruled, and allowed the respondent to read the same to the jury, to which ruling of the court the appellant then excepted. The respondent then rested, whereupon the appellant moved the court to strike out from the evidence the tax deed offered in evidence by the respondent, and to withdraw it from the jury, which motion the court overruled, and appellant excepted.

The respondent having rested, the appellant gave in evidence a certified copy of the assessment roll of said county of Multnomah, for the assessment of taxes for the year 1865, and also a certified copy of the notice of said sale of said land for delinquent taxes, and then requested the court to direct the jury to find a verdict for the appellant, which the court refused. The said assessment roll and notice of sale contained the same description of the premises assessed and sold as the tax deed, except that the words "known as Smith's farm" were not included therein. And thereupon the court proceeded to charge the jury, and, among other instructions, submitted the following:

"If you find the fact to be that there was in sec. 11, township 1 south, range 1 east, and on the donation land claim of Gideon Tibbett, a parcel of land conforming in size and shape to the land in controversy, and known in the year 1866, about July of that year, as "Smith's farm," and that there was no other similar piece of land in that section that was so known, then your verdict should be for defendant." To the giving of this instruction the appellant then excepted, because there was no evidence tending to show that in 1866, or at any other time the land in controversy had been known as 'Smith's farm.' The court then, at the request of the respondent, submitted to the jury the special question: How long, if for any time, was Isaac B. Smith, deceased, in the actual possession and a resident upon the land in controversy? And asked the jury to find a special verdict upon the said question, to the submission of which special finding the appellant objected, because it was incompetent and immaterial, and because there was no evidence tending to show that there had been any adverse possession of said lands before the commencement of his action.

A general verdict was rendered for the defendant, and the special finding was answered "since 1869." The appellant filed a motion to set aside the general verdict and also to set aside the special

verdict, both of which were refused by the court, and the judgment appealed from was entered.

The questions presented for the consideration of this court are, the admission in evidence of the tax deed and the deed from Tibbetts and wife to I. B. Smith, of March 17, 1874; the refusal of the court to strike out from the evidence the tax deed; the refusal to direct for the appellant; giving the instruction excepted to by the appellant; submitting the special matter to the jury, and in refusing the motion to set aside the special and general verdicts. There was certainly no error in admitting the two deeds in evidence. They were relevant and pertinent to the issues, and the court should not have been compelled to stop at that stage of the proceeding to consider their effect, whatever might have been its final conclusion as to their materiality. The respondent had in his answer alleged title to the premises in I. B. Smith, and set up as another defense the statute of limitations. He had a right, therefore, to give in evidence any proof that tended to establish either defense. It is the usual practice of courts at *nisi prius* to receive such proofs in the first instance, and afterwards instruct the jury as to their effect. This is the more prudent course, and an appellate court would not be justified in reversing a judgment upon such ground unless it could plainly perceive that the rights of the opposite party had been prejudiced in consequence thereof. Nor could the circuit court have properly stricken out from the evidence the said tax deed, even if its description of the premises were imperfect. It was still admissible to show that said I. B. Smith was holding under color of title. It was competent evidence, in connection with proof of possession in order to establish the defense of the statute of limitations: Pillow v. Roberts, 13 How., U. S. R., 477; Wright v. Mattison, 18 How., 50.

The request of the appellant that the court direct a verdict in his favor was properly overruled. The court had no such power over the jury as that. It had no right except to state to them "all matters of law which it thought necessary for their information in giving their verdict." It had no authority to present the facts in the case, and was required to inform the jury that they were the exclusive judges of all questions of fact: Civil code, sec. 198. The appellant had a right, when the evidence was closed, to submit in distinct and concise propositions, the conclusions of fact which he claimed to have been established, or the conclusions of law which he desired to be adjudged, or both. The conclusions of law would, of course, have been decided by the court, but the conclusions of fact would have had to have been submitted to the jury: Civil code, secs. 237, 238, 239. The court had the right, undoubtedly, to inform the jury as to what it was necessary for the respondent to prove, in order to establish his defenses, and if there were no evidence, or if it were not sufficient to make out any of the defenses, and the jury decided wrong, the court should have set their verdict aside. A jury may err in their decision, may conclude that a party has maintained a

defense, when he has not; but the law does not presume they will do so any more than it will presume that a court will mistake the law. In the event they do, however, it can be corrected without the court having to get into the jury box. The province of a jury is as certain and sacred under our law as that of the court, and the functions of the former can no more be usurped than those of the latter. The appellants could not have expected the court would set aside the verdict, unless it concluded that its charge to the jury before referred to were erroneous. The court told the jury in the charge that if they found that there was, in said section, township and range, and in the donation claim of said Tibbetts, a parcel of land conformable to that in controversy, and known as Smith's farm at the time referred to by the court, and that there was no similar piece of land in that section so known, their verdict should be for the respondent, and as the jury returned a verdict for the respondent, it is quite probable they found such fact. The court could not, in view of that instruction, have consistently set the verdict aside. Nor can this court conclude that there was error in denying said motion without determining that there was error in the said instruction. The question submitted by the court for the special finding of the jury was of very little importance. The answer returned by them was entirely inconclusive in itself to establish the defense of the statute of limitations. The length of time Isaac B. Smith was in the actual possession of and a resident upon the land in controversy, was entirely immaterial unless he was holding during the time adversely to the appellant. It was claimed by the respondent's counsel upon the argument, that the fact that Isaac B. Smith purchased the premises at the tax sale, and put the deed upon record, was evidence that his holding was as an owner. However that may be, neither the question nor finding of the jury in answer thereto, injured the appellant, and is of no advantage to the respondent on the appeal, as it does not appear that the general verdict was rendered upon the defense that the appellant had not been seized or possessed of the premises within the period of ten years. It is likely to have been rendered under the instruction as to the effect of the tax deed, or upon the three years limitation, or upon the other defense. The consequence, therefore, is, that the respondent must maintain the correctness of the said instruction, to prevent a reversal of the judgment. And if it be correct, then the appellant's other points fall to the ground, as that is the sum of all the alleged errors in the case.

After a very thorough consideration of the instruction relating to the effect of said tax deed, in case the jury found that there was a parcel of land answering to the description contained in it, we have concluded that the circuit court properly gave it. The evidence to support such a finding was very slight and unsatisfactory, but when there is any evidence, however meagre, calculated to prove any fact in a case, it becomes the province of the jury to weigh it and determine its effect; and whatever may be our view as to the correctness of the determination, we have no right, under our system of proce-

dure to reverse a judgment in consequence of an instruction to the jury that if they find a certain fact they should find a verdict in a certain way, when the fact would authorize such a finding or conclusion, and there is evidence in the case which fairly tends to support it. The description in the tax deed is sufficiently certain upon its face; that is, it was capable of being made certain, if the land therein described could be ascertained; and the evidence upon that point hereinbefore referred to, showed, in the opinion of the court, a case sufficient to be submitted to the jury.

The counsel for the appellant contended upon the argument that the land in question had no such notoriety as would justify any reference to it by name as descriptive of it. It is probably true that it was not extensively known by any one. But it consisted of thirty-seven and one-half acres, situated in the city of East Portland, was a part of a certain donation land claim, several deeds to it had been executed, the said I. B. Smith had moved onto it some fifteen years previous, had since then had it surveyed, and for five or six years prior to his death, had lived upon and cultivated it. There could have been under the circumstances no mistake as to the identity of the land assessed and sold for taxes; the people in that vicinity unquestionably were acquainted with it, and well knew, as a matter of fact, what piece of land was intended from the advertisement of the delinquent tax list and the sheriff's deed. The case is by no means free from doubt, but it comes here upon the finding of a jury upon the question involved, and after the court who tried the case has refused to set the finding aside.

The judgment will therefore be affirmed.

POPPLETON v. NELSON ET AL.

Filed June 10, 1885.

USURY—NATURE OF DEFENSE—BURDEN OF PROOF.—To establish the defense of usury requires clear and cogent proof, and the court will not accept vague inferences or mere probabilities, or resort to conjectures. The burden of proof is on the defendant, and he must sustain his allegations by a clear preponderance of evidence. Tested by these rules the evidence is insufficient to sustain the charge of usury alleged.

APPEAL from Yamhill county. The opinion states the facts.

A. M. Laughary, for the appellants.

James McCain and *W. D. Fenton*, for the respondent.

LORD, J. This is a suit in equity to foreclose a mortgage. The defense is usury. This is the main question involved, and is one of fact which needs to be proved by clear and satisfactory evidence. As the defense of usury involves a forfeiture, it is considered as an unconscionable defense, and a strict one. To establish such a defense the court requires clear and cogent proof, and will not accept vague inferences or mere probabilities, or resort to conjectures to

aid the defense. The burden of proof is on the defense, and he must sustain his allegations by a clear preponderance of evidence.

"He is impeaching his own solemn obligations under seal, and must establish the facts necessary to constitute it, beyond reasonable doubt; it is not sufficient to show an even balance of testimony; there must be a clear predonderance. Usury is a defense not favored in equity; the old consequences, the forfeiture of the whole debt, was so severe a penalty, that it was considered unconscientious:" Zabriskie, chancellor, in Conover v. Van Water, 18 N. J. Eq., 487. "The burden of proof," said Depue, J., "is on the defense, and the defense cannot be supported by probabilities or suspicions, however strong. If allowed to prevail, it must be supported by such preponderance of evidence as establishes the truth of the allegations on which it depends, beyond a reasonable doubt:" Taylor v. Morris, 22 N. J. Eq., 612; Brolaskey v. Miller, 4 Halst. Ch., 789; N. J. Pat. T. Co. v. Turner, 1 McCarter, 326. And again he says: "If the defense of usury should ever be sustained upon the uncorroborated testimony of the party by whom the security was made, the testimony should be in all respects unexceptionable." See, also, 1 Jones on Mortgages, sec. 643; Tyler on Usury, 122, 470, 472. These references are sufficient to show how the defense of usury is regarded in equity, and the strictness of proof required to support it.

As, by our statute, such a defense involves, by way of penalty the loss of the debt, the proof of it ought certainly to be clear and satisfactory. After careful examination of the evidence, we are satisfied the charge of usury is not sustained. There is no clear and direct proof; and the inferences and conjectures sought to be drawn from some of the facts are too unreliable on which to base a conclusion.

The decree of the court below must be affirmed.

GLAZE *v.* LEWIS.

Filed June 10, 1885.

JUSTICE'S COURT—JUDGMENT—DOCKETING IN CIRCUIT COURT—REVIVAL.—A judgment of the justice's court, properly docketed in the judgment docket of the circuit court, as provided in section 53, *et seq.*, of the justice's code, becomes a lien upon the real property of the defendant from the date of docketing, and stands upon the same footing as a judgment of the circuit court. Such judgment may be revived by the circuit court in the same manner as a judgment rendered therein.

APPEAL from Polk county. The opinion states the facts.

W. H. Holmes, for the appellant.

J. J. Daly and *H. L. Butler*, for the respondent.

LORD, J. This is an appeal from the order and judgment of the circuit court for Polk county granting leave to the respondent to

issue execution on a docketed judgment of the justice court. The question involved depends for its solution upon the construction and effect to be given to the provisions of our statute in respect to the docketing of a justice's judgment.

It is provided by the justice's code that "whenever judgment is given in a justice's court in favor of any one for the sum of ten dollars or more, exclusive of costs or disbursements, the party in whose favor such judgment is given may, within one year thereafter, file a certified transcript thereof with the county clerk of the county wherein such judgment is given, and thereupon such clerk shall immediately *docket the same in the judgment docket of the circuit court:*" Sec. 53, p. 469. "From the time of docketing a judgment of a justice's court as provided in the last section, the same shall be a lien upon the real property of the defendant, *as if it were a judgment of the circuit court wherein it was docketed:*" Sec. 54. And "when a judgment given by a justice of the peace has been duly *docketed in the circuit court*, thereafter it must be enforced as a judgment of such circuit court:" Sec. 61.

The appellant contends that the effect of these provisions in providing for the docketing of a justice's judgment is only to create a statutory lien, and not to make such judgment, when docketed, in effect a judgment of the circuit court; and as a consequence, he claims that when the lien has expired by lapse of time, the effect of the docketing is gone and the judgment lapses into its former condition of a justice's judgment, which the circuit court is without jurisdiction to revive, but that if such judgment can be revived at all, it must be done by the justice's court. It is quite certain that a justice's court is without the power to revive a judgment so as to create a lien. Its judgments only have this effect when docketed as prescribed by the section cited, and if the argument insisted upon is tenable, when the lien expires the judgment cannot be revived.

The provisions of the sections referred to, are, in substance, that when such judgment is docketed, "the same shall be a lien, etc., as if it were a judgment of such circuit court," and, "thereafter, it must be enforced as a judgment of such circuit court." The words, "as if it were a judgment of such circuit court," seem intended to place such a judgment when docketed, upon the same footing in all respects as to the lien creditor, with a judgment of the circuit court, and, as "thereafter it must be enforced as a judgment of such circuit court," it would seem, when docketed, to have the same effect as a judgment of the circuit court. Under a statute providing that "such judgment shall have the same effect as a judgment rendered in the circuit court, and may, in the same manner, be enforced," etc., it was held that a transcript properly certified, filed and docketed, renders the judgment thus transcribed and certified, a judgment of a court of record from the time of such filling and docketing; thus changing in some degree its nature, and very materially the rights, power and liabilities of the parties to it: Jewett v. Bun-

nell, 3 Mich., 199, 200. When docketed in the circuit court, it has the same effect as a judgment rendered in that court, and is to be enforced, cancelled or discharged, and is affected by the statute of limitations in the same way: Arnold v. Thomson, 19 Mich., 333; Davis v. Elliott, 9 Mich., 252. It is from the date of the docketing of a judgment of the circuit court that it becomes a lien upon the real property of the defendant: Civil code, sec. 263. And when a properly certified transcript of a judgment of a justice's court is filed and docketed "in the judgment docket of the circuit court," the same becomes a lien upon the real property of the defendant from the date of docketing such judgment, and it stands upon the same footing as a judgment of the circuit court. When, therefore, it was sought to revive the judgment, the circuit court had jurisdiction in the premises, and the application for leave to issue execution was properly made to it.

There was no error, and the judgment must be affirmed.

MANDAUDAS *v.* HEILNER ET AL.

Filed June 10, 1885.

ACCOUNTING—EVIDENCE REVIEWED.—In an action for an accounting the evidence reviewed at length, and the decree ordered modified in accordance with the views expressed in the opinion.

APPEAL from Baker county. The opinion states the facts.

L. O. Stearns and *Bonham & Ramsey*, for the appellants.

L. L. McArthur, for the respondent.

THAYER, J. This appeal is from a decree of the circuit court for the county of Wasco, rendered in a suit commenced by the respondent against the appellant, originally in the county of Baker. The venue was changed to suit the convenience of the parties, to said county of Wasco. The suit was to compel an accounting, and to decree a recovery of certain real and personal property from appellants to the respondent.

It appears, from the proofs and pleadings in the case, that the appellants, for some time past, have been engaged in merchandizing in the county of Baker, and that the respondent has been engaged in mining there; that the respondent, some years ago, opened an account with appellants, and with other mercantile firms doing business in that county, with which the appellants had partnership connections; that, on the twenty-sixth day of March, 1878, the respondent was indebted to appellants on account in the sum of one thousand nine hundred and eighty-one dollars, and, thereupon, made an absolute transfer to them of a large amount of real and personal property, consisting of mining claims, flumes, etc.; also a lot in Baker City, in said county, and certain personal property, and

that, on the twenty seventh day of March, 1878, said appellants and respondent entered into a written agreement, relating to the said transfer of said property, and which, evidently, was a part of that transaction, of which agreement the following is a copy:

"This agreement, made this twenty-seventh day of March, 1878, between S. A. Heilner and E. D. Cohn, of Baker county, Oregon, and Joseph Mandaudas, of the same place, witnesseth that, whereas, on March 26, 1878, said Mandaudas sold and conveyed by bill of sale, for consideration mentioned of one thousand dollars, to said Heilner & Cohn, a large number of placer mining claims, flumes, structures, house on claims, blacksmith tools and appurtenances, stock cattle and horses, known as the Leatherwood Mining and other property, situated on Quartz Gulch, and other places in Shasta and Willow Creek mining district, in Baker county, Oregon; and also conveyed by deed executed by himself, certain ditches and water rights, flumes and property, to said Heilner & Cohn, for consideration mentioned at five hundred and sixty-one dollars, at same date, said ditches and water right property being known as the Leatherwood ditch and water right property, in and about said Shasta mining district, in said county and state; said property and bill of sale and deed being of record in clerk's office in Baker county, Oregon.

"And, whereas, on said date, one Peter Mann, for consideration of three hundred and twenty-five dollars expressed, executed his deed to said Heilner & Cohn for lot 2 in block 2 of Fisher's addition to Baker City, Oregon, with tenements and appurtenances, which deed of record in said county, said considerations being debts, for the most part, of said Mandaudas, assumed, paid and settled by the said Heilner & Cohn for the said Mandaudas, amounting, in the aggregate, to one thousand eight hundred and eighty-six dollars, and interest, amounting to ninety-five dollars; total, one thousand nine hundred and eighty-two dollars.

"Now, therefore, it is agreed by and between the parties that, if the said Mandaudas shall repay the said amount of one thousand nine hundred and eighty dollars, in gold coin, to the said Heilner & Cohn, with twelve per cent per annum interest thereon, from date hereof, in manner and form as follows, to wit: On or before January 1, 1880; and said Mandaudas promises to pay the said sum from and out of the gold extracted and cleaned up from the working of the said mines, or part thereof, so conveyed to said Heilner & Cohn, and hereinafter let to said Mandaudas, who hereby covenants to work some part of said mines, or all that may be practically or profitably worked, at his own expense in all things, in workmanlike manner, with diligence, economy and dispatch, to the end that said payment of said sum may be made as early as possible before the said date. And in consideration of the premises, and one dollar to them paid by said Mandaudas, the said Heilner & Cohn let the said mines, mining property, ditches, water rights and interests to the said Mandaudas for the term of two years, to be worked and operated by him

at his own expense, in a workmanlike manner, according to the customs, laws and usages of said mining district, and of the state and of the United States, to the end that the title thereto shall be protected from forfeiture, and at every clean-up the net proceeds of gold extracted from the working of said mines shall be immediately paid over to said Heilner & Cohn to be applied by them toward payment of said sum until said sum is fully paid; and when so paid, or if paid in any other manner by said Mandaudas before said January, 1880, that then said Heilner & Cohn agree to re-convey all the said property to the said Joseph Mandaudas, or such right or title as they may then have therein.

"And it is agreed by parties herein that in case of the failure of the said Mandaudas to pay the said sum, or make substantial default herein, that then said deeds and bill of sale shall become absolute at the option of said Heilner and Cohn, who may enter and take peaceable possession thereof from the said Mandaudas, and sell and dispose of the same as they may deem best."

It appears that after the execution of the above agreement, the said respondent continued to deal with the said appellants, and with other firms with which they were connected in business, and purchased from them goods, wares and merchandise, and they advanced him money and paid money at his request and for his use, and that respondent in return paid to appellant gold dust and money; that they continued their mutual dealings until some time in July in the year 1880, when the appellants, with the knowledge and consent of the respondent, entered into a written agreement with one W. B. Benson, in regard to certain of the property transferred to them by the respondent, and referred to in their said agreement of March 27, 1878, before set out. The latter agreement is as follows:

"This agreement made and entered into the —— day of July, 1880, between S. A. Heilner and E. D. Cohn of Baker county, the parties of the first part, and W. B. Benson of the same place, the party of the second part, witnesseth: That the parties of the first part in consideration of the covenants and agreements on the part of said party of the second part hereinafter contained, agrees to sell unto the said party of the second part the following described placer mining ground and water right and ditch property, situate in Shasta mining district, Baker county, Oregon, to wit: (Here follows a very lengthy description of the property sold, which we omit.) * * * for the sum of eight thousand dollars, and the said party of the second part in consideration of the premises agrees to pay to the said party of the first part the said sum of eight thousand dollars, in manner following, to wit: One thousand dollars on the execution of these presents. And as to other payments the party of the second part agrees to take possession of said mining ground and other property immediately, and with a sufficient force of men, diligently work the same in a skillful and proper manner during the mining seasons when water can be purchased or had at the rate of

twelve and one-half cents per inch, and with a sufficient amount of water to work to advantage when it can be had, and first work up through said Campbell ground and then otherwise to the best advantage, to extract, wash out and clean up the gold contained in said mining ground, and at each clean up hereafter, the said party agrees to pay over and deliver in good clean gold dust one-third of the gross proceeds of all the gold so washed out, extracted and cleaned up, without delay as soon as cleaned up. And out of the remaining two-thirds of each clean up of gold so made hereafter, after deducting all expenses of working said claims during the run, then to pay over and deliver to the parties of the first part, whatever gold dust may remain of such clean up, and the said gold dust so paid over and delivered to the parties of the first part at such time of each claim clean up shall be applied and credited on this agreement as a part payment of said purchase money at the rate of seventeen dollars per ounce until the balance of said purchase money is fully paid.

"And the party of the second part also agrees that out of all the gold dust extracted and cleaned up out of any drift dirt, the full one-half thereof when so extracted, washed and cleaned up, shall be immediately paid over and delivered to the said parties of the first part and applied and credited on this agreement as a part payment of said purchase money until the same is fully paid. And the party of the second part further agrees to keep an account of the all the gold dust washed and extracted and cleaned up in the working of said mining ground by the use of said Birch creek water used for working said claims in the spring, and to use the same to the best advantage each spring, and out of the gross proceeds of all gold dust cleaned up by use of said water to pay over at the close of the Birch creek water season the full one-half of such gross proceeds to the said parties of the first part to be applied as a part payment on the purchase money of this agreement until the balance remaining due is fully paid.

"And the said party of the second part agrees to notify said parties of the first part of the time or times of each and every clean up of said mining claims so worked, and permit them or their agents to be present to witness such clean up. And said parties of the first agree to deliver immediate possession of said premises to the party of the second part, to the end that the said mining ground may be so worked, and the balance of such purchase money of eight thousand dollars so paid from such proceeds of gold extracted therefrom, and from such water rights and ditches, in manner aforesaid. And the parties of the first part also agree that on receiving the said sum of eight thousand dollars at the times and in the manner above mentioned, or, if paid otherwise or sooner by the said party of the second part, they will execute and deliver to the said party of the second part at their own proper cost a good conveyance of all their right, title and interest in and to all said property.

"It is further agreed and understood by the parties hereto, that, should the party of the second part make default in any substantial particular in the performance of his part of this agreement, that then the parties of the first part may, at their option, reenter and take possession of said premises and terminate their agreement; and the said party of the second part shall forfeit all right to a conveyance of said property, and all right of possession thereof, and of the purchase money paid thereon as damages for such default in the performance of his part of this agreement. And it is understood that the stipulations aforesaid are to apply to and to bind the heirs, administrators and assigns of the respective parties, and it is further agreed by the said party of the second part, that he shall not sell, assign, mortgage or pledge his interest in this agreement, or in said property, or any part thereof, or deliver possession thereof to any person or persons other than the parties of the second part, except by permission of the parties of the first part.

"And it is further understood that this agreement is to sell all the mining claims and property situate in and adjacent to Quartz gulch heretofore sold by W. J. Leatherwood to Joseph Mandaudas and by John Campbell to said Mandaudas.

"That all erasures and interlineations herein were made before execution hereof.

"In witness whereof the parties of the first part hereto set their hands and seals, and the said party of the second part also sets his hand and seal the day and date first above written.

"In presence of

"JOS. MANDAUDAS, } S. A. HEILNER & CO. [SEAL.]
"HERMAN HAAS. } W. B. BENSON. [SEAL.]"

It appears also that the respondent occupied and worked the mining ground referred to in said last mentioned agreement, until the time of the execution of the said agreement, when it was turned over to the said Benson, and thereupon he began working it in accordance with the terms thereof. It further appears that sometime in May, 1879, a suit was commenced in the circuit court for said county of Baker, by one James Lynn, against the appellants, respondent, and a ditch company consisting of Packwood & Carter, to restrain them from running what is termed tailings on to Lynn's mining ground by running water from the ditch of said Packwood & Carter down through certain flumes of said Lynn, said water supplying said mines referred to in the said written agreement with said Benson; that said suit involved a large expense in procuring witnesses, and on account of attorney and referees' fees, and other incidental expenses; that it continued pending until the March term, 1880, of said circuit court, when it was heard, and on the fourth day of August of that year a final decree was entered therein, and each party required to pay one-half the costs and disbursements of the suit, including the fees of the referee and commissioner appointed to execute the decree. A controversy arose in regard to the

taxation of the costs and disbursements, and they were not adjusted till July, 1881, at which time they were adjusted by the court upon appeal from the decision of the clerk in the taxation thereof. It further appears that on the fifteenth day of December, 1880, the respondent and appellants had a settlement of their affairs; that appellants brought forward an account for general merchandise furnished the former, and of money advanced and paid for him, and also accounts of the other firms before referred to, and which accounts contained credits in favor of the respondent for gold dust and money received from him, also from the proceeds of the mine under the management of said Benson; that in said settlement there was included said accounts of the appellants and the credits of the respondent, and that in the adjustment there was found due from the respondent to appellants the sum of four hundred and fifty-three dollars. At that time the respondent was about to make a visit to France, and he borrowed from the appellants through Mr. Cohn, one of the members of the firm, five hundred and forty-seven dollars, and executed to Cohn for said firm, his promissory note for one thousand dollars, covering the balance of the account and the borrowed money. It further appears that Benson, when he entered into the agreement with the appellants, of July, 1880, did not pay the thousand dollars therein agreed to be paid on the execution thereof, but that he executed his promissory note therefor to Heilner, one of said firm, and Mr. Cohn, the other member thereof, endorsed it. Said note was never paid, but is still in the hands of appellants.

And it further appears that the appellant paid certain of the costs and expenses of said suit brought by Lynn, and claims to have paid the following items and to the following named persons, on account of said suit, and that they are entitled to charge the respondent with the amount, viz.: To I. D. Haines, $300.00; I. B. Bowen, $172.50; Grier & Kellogg, $117.00; Mrs. Howard, $27.00; John Fenman, $8.00; S. H. McLaughlin, $145.00; I. B. Bowen, $87.25; Jos. Shinn (referee fees), $800.00; Jas. Lachner, $96.50; C. M. Foster, $40.00; Lawrence & Shinn, $500.00; T. C. Hyde, $119.00; E. L. Bradley, $16.00; H. Deckman, $46.00.

Subsequent to the said fifteenth day of December, 1880, the appellants made the following advancements to, and for, the respondent, of money and goods, viz.:

Feb. 25, 1881.	Remittance to France	$125 00
April 4, "	Paid Stearns & Balleray note	708 00
" 18, "	Telegraphic Exchange	105 50
May 18, "	Cash	25 00
July 26, "	Ottenheimer & Co's account	115 00
	Washington Gulch account	17 00
	Kauffman & Co's account	99 00
		1,194 00

And it further appears that the appellants received from the proceeds of said mine, subsequent to said fifteenth day of December, 1880, gold dust amounting in value to the sum of one thousand four hundred and ninety-six dollars and forty-one cents; that the same was received July 17, 1881.

These general facts are the data, as I view the case, from which an adjustment and settlement of the mutual accounts and claims between the parties is to be made. Some questions have been made in regard to the relations of the parties created by their agreement set out herein, but there can be no serious difficulty from that source. The instrument operated as a mortgage beyond doubt. Another question presented is, as to the amount for which the appellants became liable upon the agreement with Benson, but that is easy of solution. The appellants are chargeable with no more than they received from the working of the claim by Benson under the agreement, unless they are to be charged with the Benson note of a thousand dollars. There would be no difficulty in arriving at a correct conclusion if we could ascertain when the expenses of the Lynn suit were paid, and whether they were included or not in the settlement of December 15, 1880. The respondent insists that the portion thereof he was liable to pay was included in the settlement, but the appellants contend that the respondent is liable for the whole expense paid by them on account of said suit, and that the expense was not included in the settlement; that the suit was not then terminated, and that the bill of items upon which the settlement was made shows that they could not have been included. The counsel who tried the case here, seemed to have overlooked the importance of having an account taken between the parties by some competent accountant, and contented themselves with the introduction at the hearing of depositions. The case should not have been submitted in that style; a good book-keeper would have been much more effective in ascertaining the rights of the parties than a jurist, but the case is here, and we must dispose of it by the aid of such evidence as we have before us, or send it back and have the facts more thoroughly investigated. The circuit judge who heard the case, found that there was a balance due the appellants, from the respondent, of five hundred and thirty-one dollars and fifty-five cents. As I understand it, he allowed to the appellants one-third of the expenses paid or claimed on account of said Lynn suit, after reducing the referee's fees from eight hundred dollars to three hundred and twenty-five dollars, and allowed the thousand dollar Benson note in favor of the respondent. The basis of his computation may have been just, but I do not see how the result could have been reached, in view of the unsatisfactory character of the evidence, by any certain mode. At least I feel that the attempt to approach the real truth in the case is a groping effort. It hardly seems equitable to charge the appellants with the Benson note, when they realize nothing therefrom, nor are ever likely to.

Again, the appellants have not produced a single voucher showing that they have paid any single item of the expense of said suit. Heilner testified that he had paid the several items before mentioned, but did not state when he paid them, nor were the parties to whom the payments were claimed to have been made, produced. Besides, the accounts the appellant exhibited of merchandise and money furnished the respondent prior to said fifteenth day of December, 1880, were far from satisfactory, and contained unconscionable charges of interest; but as the parties settled them, we do not feel at liberty to question their correctness, and would not refer to the matter except as a circumstance tending to raise a suspicion against the other account. In my opinion it would be doing justice in the case to determine that the debt for which the transfer of the property was made by respondent to secure, and the other indebtedness which has accrued since, have been paid. The appellants have had possession of the property for a number of years, it has been productive, and they have received large payments from respondent, and kept the only account of the transactions we have, and if they have not been able to liquidate the indebtedness under the circumstances, or show by satisfactory proof that it has not been paid, they ought to forgive it, and grant the respondent a jubilee after the manner of an ancient and venerated custom.

There are, however, other circumstances to be considered. A good deal of the property included in the instrument by which the transfer was made to the appellants, was never delivered to them, nor did they have possession thereof. That property, of course, should not be included in the decree for a reconveyance, nor should the property that has been sold by appellants, where the respondent has been credited with the price, be decreed to be reconveyed, except upon condition that the respondent pay such price. It appears that the appellants sold the barber shop in Baker City, on December 30, 1879, for six hundred and seventy-five dollars. This may or may not have included said lot 2 of block 2, of Fisher's Addition, as described in the contract between appellants and respondent before mentioned. However that may be, the respondent has been credited with the six hundred and seventy-five dollars, as will be seen upon the appellants' exhibit of accounts, and he should not have the property back, except upon condition that he pay appellants that sum. Under the view suggested, the decree herein should be that the appellants, within sixty days after the entry of this decree in the court below, execute and deliver to the respondent a good and sufficient deed or other instrument of reconveyance of all the property conveyed to them by the conveyance of March 26, 1878, except such personal property as was not delivered to them or retained by respondent, and except also, such property as the appellants have sold that was so conveyed to them and the price therefor has been credited to respondent upon accounts between them which have been settled, unless the respondent pays to appel-

lants such purchase price, and the respondent shall recover costs of this appeal; that the decree appealed from be affirmed except so far as modified by the decree herein.

Let a decree be entered accordingly.

SCOGGIN *v.* HALL.

Filed June 10, 1885.

EQUITY JURISDICTION—JUSTICE'S COURT—APPEAL.—A bill in equity does not lie to restrain the enforcement of a judgment of the justice's court, alleged to have been obtained by reason of the intimidation of the plaintiff's witnesses. The remedy in such case is by appeal to the circuit court, and the fact that such remedy has been lost by reason of the negligence of the plaintiff in failing to serve a notice of appeal in the proper manner, will not create a jurisdiction in equity.

APPEAL from Wasco county. The opinion states the facts.

Hill & Mays, for the appellant.

Watkins & Bird, for the respondent.

THAYER, J. This appeal is from the circuit court for the county of Wasco. The respondent commenced an action in a justice's court in that county, against the appellant to recover a colt, which was about eight months old, and damages for its detention. The colt was alleged to be of the value of thirty-five dollars. The parties met before the justice and engaged in the trial of the case. It seems that a row occurred between some of the witnesses, which interrupted the proceedings of the trial. The justice, in order to get matters quiet, adjourned the trial over to the following morning, at which time the appellant appeared and claimed that the disturbance the day before had intimidated his witnesses, and that he was unable to secure their attendance, and he took no further part in the proceedings, and the respondent obtained a verdict of the jury, upon which the justice entered judgment. The judgment is rather informal, but not void. After the rendition of the judgment, the defendant made an ineffectual effort to appeal therefrom to the circuit court for the county of Wasco, and having failed in that, commenced a suit in said circuit court to have the enforcement of the said judgment enjoined. The grounds of this suit were, that the justice's judgment was void; that he had not been able, on account of the riotous conduct of the respondent and others, to make his defense in the said justice's court, and that he lost his remedy by appeal in consequence of the mistake of the constable in not serving the notice of appeal. The pleadings in said suit were made up and depositions were taken on both sides, which, with other proofs, were submitted to said circuit court. Upon hearing the case said court found that the allegations of the complaint were not sustained, and thereupon dismissed it. From that decision, this appeal is taken.

The question before the court is mainly one of fact. I have examined the testimony with some care, but have not been able to

discover that the difficulty which occurred at the justice's court trial was of a very serious character. It seems to have been more of a temporary character than otherwise, occasioned by some of the witnesses who were outside of the court room getting into a broil. The parties who were in the court room became interested to know about the affair, and several of them went out, and the respondent took off his coat. How long the difficulty continued does not appear. It was not a respectable occurrence, but not necessarily indicative of a perverse sentiment in the community in which it took place, nor was it *sui generis*. Scenes of a similar character about justice's courts have frequently happened, and have been known to occur even in circuit courts, and failed to intimidate a party. Such occurrences will not justify a withdrawal from a trial and the commencement of a suit in equity to impeach the proceeding at law, unless attended with such a degree of violence as to obstruct public justice, and the adverse party takes a fraudulent advantage of the situation. When order cannot be maintained in courts of law, it will not long survive in courts of equity. And when it cannot be upheld in the inferior tribunals, they should be abolished. If the grounds upon which jurisdiction in equity is claimed in this case were conceded, it would be to my mind a humiliating admission. I should be loath to acknowledge that a regular trial of the right of possession of an eight-months old colt, of the value of thirty-five dollars, could not be had before any justice of the peace in any precinct in this state. I may be too incredulous in that particular, but if I am mistaken as to the fact, the attention of the grand jury should be directed to such precinct at once. At least some other remedy should be applied than taking such a character of litigation into the bosom of chancery. But it is idle to consider the question involved. There is no feature of it to which equity jurisdiction will attach. The appellant had a plain, speedy and adequate remedy at law, and it was not exhausted when intimidation overtook his witnesses. An appeal to the circuit court, where he could have had a regular trial by jury, was open to him. All that was necessary was to serve a proper notice of appeal, give the requisite undertaking, and file a transcript of the proceedings of the justice's court, with the clerk of the appellate court. The constable's mistake in not serving the notice of appeal was no excuse; the law does not compel a party in such a case to employ a constable, and he would have no business to employ an inefficient, careless one, under any circumstances. The failure has the appearance of having resulted from negligence, viewed from any point. The case has been dragged into the circuit court, and has cost more, I imagine, than the colt will ever be worth.

The judgment appealed from should be affirmed.

WILSON ET AL. *v.* WELCH ET AL.

Filed June 10, 1885.

TIDE LANDS—OPTION TO PURCHASE—PURCHASE OF—ANNULLING PATENT.—Conceding that the state has an absolute ownership in lands between high and low tides, a party who has an option under a statute, to become a prior purchaser thereof, under certain conditions, has no equitable title therein, which can be enforced against another purchaser. His remedy in such case is to have the state commence an action against the purchaser to annul the patent issued to him, and, upon obtaining such relief, make an application for the purchase of such land.

THE SAME—TIDE LANDS PASS WITH DEED TO UPLANDS.—The rights which an owner of uplands, bordering on the banks of a navigable stream, has in the adjacent tide lands, passes by a deed of the former lands, unless an intention is manifested to reserve them from the operation of the conveyance.

APPEAL from Clatsop county. The opinion states the facts.

E. C. Bronaugh, for the appellants.

Sidney Dell, for the respondents.

THAYER, J. This appeal is from the circuit court for the county of Clatsop, rendered in a suit commenced by the respondents against the appellants to declare a trust in favor of the former in certain tide lands formerly conveyed by the state of Oregon to James Welch, ancestor of the appellants.

The respondents alleged in their complaint in the suit that said James Welch procured said deed from the board of commissioners for the sale of school lands, etc., on the eighteenth day of September, 1876; that in his application for the purchase thereof, he fraudulently represented that he was the owner of block 11, in the town of Astoria, which abuts upon said tide land, when in truth said block did not belong to him; that he and one Shively had, by deed bearing date June 3, 1846, conveyed it to John Wilson, ancestor of the respondents, and that the latter owned it at the time said application was made, and that no notice of any kind was given to him or to any one by said Welch or said board, nor by any person, of the application; that both James Welch and John Wilson had since died, and that the appellants and respondents are their respective representatives and successors in interest, the respondent, Ann R. Wilson, being widow of the said John Wilson, and the said Mary E. Wakeman, a daughter; that the former owns a dower right in said block 11, and the latter owns the remainder. The respondents further alleged that on August 29, 1877, they commenced an action against the appellants to recover the possession of said block 11, and that on March 27, 1878, they recovered a judgment against them, whereby it was adjudged that said John Wilson was the owner in fee of said block, by virtue of said deed of June 3, 1846, until his death, and that they then became the owners thereof as mentioned, and entitled to the possession. They alleged, also, that they did not know the exact amount of purchase price paid by James Welch to the state of Oregon for said tide lands, but offered to pay the same when ascertained by the court.

The appellants denied that said James Welch procured the deed from the state to the tide land by the representation alleged; denied

that said block 11 abutted or fronted on the shore of the Columbia river; claimed that on said third day of June, 1846, it was above ordinary high water mark, but that since said time the water had gradually encroached upon the bank of the river, upon the north side of said block, and that the line of ordinary high tide had moved south until it then reached the north boundary thereof; that by said deed, the said block thereby intended to be conveyed is bounded by metes and bounds, and the number and size of the lots expressly given, and that the deed was made solely with reference to said parcel of land as a platted block, and the parties intended it should not extend further on the north than the street known as Wall street, but which was, by mistake, designated in said deed as Water street, which lies in front of the block, and between it and said tide land; that in front of the block is a strip of land included within said street which was above ordinary high tide, and in front of the strip and of the street was a tide flat extending for a distance of seven hundred feet, susceptible of being easily reclaimed, which flat, at the date of the purchase of the block by said John Wilson, was of great value; that from the north side of the flat it was six hundred feet to the ship channel of the Columbia river, and that said space was valuable for wharfing purposes, and at the date of the deed was worth several thousand dollars; that it had been duly platted and laid off into lots and blocks, with streets extending through the same, which fact said Wilson well knew at the time he purchased block 11; that about 1845 said James Welch bought of said Shively all his right and property as riparian proprietor of the tide lands in controversy; that the appellants had succeeded to his rights, and that they and said James Welch, for more than thirty years, had paid taxes on the land as their private property, and had paid one thousand dollars for street improvements. These facts were, in the main, denied by the respondents in their reply.

The proofs in the case show that said Shively, sometime prior to the year 1846, settled upon a tract of land including said block 11; that he conveyed an undivided half of it to said James Welch; that they surveyed and laid off a part of it into lots and blocks; that Welch gave to Shively a power of attorney; that said Shively executed the deed for himself and said Welch to the said John Wilson, of June 3, 1846, to said block 11; that after the passage of the donation act of September 27, 1850, the said Shively, after taking back a deed from Welch of the undivided half interest, entered the said tract of land as a donation claim, and subsequently, and in the year 1860, obtained a patent to it; that after his entry and compliance with the provisions of that act, said Shively reconveyed to said Welch a portion of the claim in severalty, which conveyance included said block 11. The deed to Wilson, of June 3, 1846, purports to convey a parcel of land in the town of Astoria described as being a part of the settlement rights of said Shively, on which he had laid out and surveyed said town, and which premises consisted of lots numbered from one to twelve inclusive, forming block 11, which it de-

scribes as being bounded north by Water street, east by Spence street, south by West First street, and west by Pine street, which lots it states were each fifty feet front by one hundred and forty-two and one-half feet back, reference being had to the plat of said town of Astoria, so laid out as before mentioned, which plat had then been lithographed by E. & J. Hutawa, of St. Louis, Mo. The deed also contains a covenant to have said plat recorded as soon as there should be an office provided by law for that purpose. It also contains a covenant that the grantors will forever warrant and defend the fee simple title to the premises, free from the claims of all persons whatever; also that the grantors, their heirs, executors and administrators will, at the expense of the grantee, his heirs or assigns, make a new and further deed, if the same should be required to vest a fee simple title, when they or either of them shall demand the same. The deed was not acknowledged or proved so as to entitle the same to record until March, 1876, and was recorded in the office of the clerk of the county of Clatsop in April of that year. It further appeared in proof that said James Welch did base his right to purchase said tide land, when he made said application to purchase, upon the ground that he was the owner of said block 11, upon which it abutted at that time; and it further appears that at said time and for a long time prior thereto, he had claimed to be the owner thereof, and that the appellants continued to claim such ownership until the affirmance of the judgment by this court recovered against them as before mentioned. Proof was also given tending to show that there had been a narrow strip of high land adjoining said block 11 on the north, within the street called Water street, but that it had been carried away by the action of the water, but at what date it disappeared is not shown.

The land in controversy includes less than half an acre. It was purchased by said James Welch of said board of commissioners under the provisions of the act of the legislative assembly of the state to provide for the sale of tide and overflowed lands on the sea shore and coast, approved October 28, 1872, as amended in 1874. That act provides that the owner or owners of any land abutting, fronting or bounded by the shore of any bay, harbor or inlet on the sea coast, shall have the right to purchase from the state all the tide land belonging to the state in front of such owner or owners, subject to certain provisions, which allow the owner of improvements upon such title lands to purchase the lands so improved, for a certain period, and also allow outside parties to become such purchasers in case the owner or owners of the high land fail to make application for the purchase of the same for three years, but in the latter case the board of commissioners for the sale of such lands must give the owner or owners of the high land, having the preference in the purchase thereof, notice of such application to purchase the same, who, thereupon, have sixty days after the notice is given, in which to make application to purchase. It was conceded in this

case that the said board of commissioners gave no such notice to said John Wilson or the respondents.

The appellants' counsel claims that if a strip of high land did exist north of block 11, on June 3, 1846, so that the wharf privileges remained in Shively and Welch after the execution and delivery of the deed of that date, such right, and, as he claims, the consequent right to purchase the tide lands in front of that strip, would not be divested out of Welch and vested in Wilson by the fact of the washing away of such strip of land before the passage of said act. He also claims that the effect of the descriptive part of said deed, in which the lots in said block are conveyed by number and dimension respectively, and then the block bounded specifically, by streets between which it lies, is sufficient and conclusive evidence that it was the intention of the grantors to limit the grant to the land contained within the exterior boundary lines of the block, and to reserve the wharf rights and privileges between the north line of said Water street and the ship channel.

The decision of this court in Wakeman and Wilson v. Shively, 3 West Coast Rep., 336, at the March term, 1884, was adverse to the points raised by the counsel; still, as I view the question, they are very important matters. A shore owner upon tide waters, or upon a navigable stream, possesses rights which, of late, are conceded to be property: Yates v. Milwaukie, 10 Wall., 497. They are not rights, as has often been supposed, that were derived from the state, though held and enjoyed in subordination to the rights of the public: Dalaplaine v. C. & N. W. R. R. Co., 42 Wis., 214; Lonnan v. Benson, 8 Mich., 18. The embarrassing feature of this subject has arisen out of a misunderstanding of the nature of the state's ownership of land between high and low water upon navigable streams. It has been spoken of as an ownership in fee, and an erroneous impression has been conveyed. The state does own the channel of the navigable rivers within its boundaries, and the shore of its bays, harbors and inlets between high and low water, but its ownership is a trust for the public. It has no such proprietorship in them as it has in its property and public buildings. It cannot sell them so as to deprive the public of their enjoyment: Steam Engine Co. v. Steamship Co., 12 R. I., 348; nor can it take away riparian rights except for public use, and by giving just compensation: Gould on Waters, section 150. The New York courts have taken a different view, and which has been followed by an Iowa decision: Tomlin v. Dubuque, etc., R. R. Co., 32 Iowa, 106; but it is repudiated by the federal, and most of the state, tribunals. If, then, the riparian rights referred to, such as wharfing privileges, are property they may be sold, or reserved to the owner of high land upon which the tide land abuts. There is no reservation in terms in the deed of June 3, 1846, but if the riparian rights belonging to Shively and Welch were not conveyed, which was the case if there was a strip of high land between said block 11 and the tide land in question not conveyed by the deed, they necessarily

remained in them, and I do not see how they could be divested out of them without their consent, unless such rights are held to be inseparable from the upland. But that would not be consistent with the holding in Parker v. Rogers, 8 Or., 189.

Too much importance, I apprehend, has been attached to the tide land act before referred to. I seriously doubt whether that act confers any new right upon the shore owner in such cases, although he has purchased the land in front of him in accordance with its terms. The title he obtains is subordinate to the public right of passage and navigation, and he had the same wharfing privileges before as afterwards, and the right to protect his uplands from the encroachment of the sea. According to Hale there are three sorts of rights in ports and shores: First, the *jus privatum*, or right of property or franchise; second, the *jus publicum*, or public right of passage and navigation; and, third, the *jus regium*, or governmental right. The state could not by any sale of the shore of a body of water below high tide, deprive itself of the latter right, nor, as before suggested, could it thereby deprive the public of the right of passage or navigation. What, then, can such a sale of that character of tide land amount to? I doubt very much whether a sale in such a case could be made to an outside party, that would deprive the riparian owner of any right to the enjoyment of the land. It was held in the case of The People v. Cowell, 60 Cal., 400, that lands within the flow of ordinary tides, the cost of reclaiming which would greatly exceed their value when reclaimed for any agricultural purpose, were not acquirable under a statute authorizing a sale of reclaimable lands. The state might authorize a sale, doubtless, of tide flats, and the purchaser have the right to reclaim them and devote them to private use, where no right of public passage or navigation is infringed, but to attempt to sell a part of the channel of a navigable stream below any ordinary stage of high water occasioned either by tides or freshets, is absurd. But if I am mistaken in this view, and the state has an absolute ownership in such cases, as some of the authorities would seem to indicate, how can the respondents maintain their suit to declare a trust in their favor in the land in controversy. They nor their ancestors never owned it legally nor equitably. Conceding their ownership of block 11, and that the tide land abutted upon it, that certainly gave them no ownership of the latter, if the title was in the state. The act of 1872 graciously gave them, in that case, a preference in the purchase, but it prescribed conditions upon which the purchase can only be made. The respondents do not allege or show that they have ever attempted to comply with these conditions. It may be inferred that they consider the purchase by Welch, based upon his claim to be the owner of said block 11, made it unnecessary for them to apply, but how does the court know that they would have purchased the land if Welch had not? The act provides for a regular sale of such lands. Section 3 says that the applicant shall, with his application, present to the officer or officers who are or shall be authorized to sell such

lands, evidence of his title to land which abuts, etc., upon such tide land; and section 4 says that the value of such tide lands shall be appraised at a certain sum per acre, which shall not be less than one dollar and twenty-five cents for each acre of such land; provided that the board having in charge the sale of such lands shall have power to set aside any appraisement on evidence taken of the true value of the same, and shall make another and true appraisement based on such evidence. The act did not contemplate that the applicant should get the land for less than its true value in any case, and the legal privilege in favor of the shore owner was merely to buy the land for what it was actually worth. In such cases, many shore owners might not be inclined to attempt to make such purchase. Whether the respondents would have been so disposed is left entirely to conjecture; and yet they now claim that Welch's title should enure to their benefit.

I can readily understand that where one has the equitable title to real property, the legal title to which is outstanding, and another person wrongfully buys in such legal title, a court of equity could decree that the legal title so purchased should enure to the benefit of the equitable owner. To grant such relief, however, in favor of one who never had the equitable title, who had merely an option to purchase the property upon such terms as might be agreed upon with the owner, and who had never proposed to make the purchase, or indicated any intention of that character, would be carrying the doctrine to an unjustifiable extent. I think the respondents' remedy in this case, under the theory that the state had the absolute title to the property in question, and had conveyed it to James Welch, was to have the state commence an action for the purpose of vacating the patent or deed executed to him, as provided in section 355 of the civil code; and when a judgment has been obtained annulling it make their application for the purchase of the land.

But, as before suggested, I do not think the sale affected the rights of the owners of the land upon which the tide land abutted. The main question in the case, as I regard it, is to whom those rights belonged. If by the terms of the deed of June 3, 1846, from Shively and Welch to John Wilson, they were reserved to the former, then they are rightfully in the appellants, but if no such reservation was made in that instrument, then the respondent succeeded to them, whenever they became shore owners. The rights which attached to the narrow strip, which counsel for the appellants claims was not conveyed by the deed, and which existed as a mere incident of that parcel of land, were lost when it was washed away. The courts have usually held, where the question has arisen, that where a lot or block is bounded in a deed by a street, the deed operates to convey the land to the center of the street. Under such a construction it is quite evident that the deed of June 3, 1846, conveyed the high land adjacent to and on the north side of said block 11. I am informed that this court has so ruled, and I must consider that ruling as decisive of the question. But if the deed

referred to showed an evident intent to reserve the said riparian rights to the grantors, they and their successors should be adjudged the owners thereof. In Codman *et al.* v. Winslow, 10 Mass., 149, it was held that a deed to a tract of land bounded on a street or way would not be admitted as extending across the street or way so as to include other lands and flats below high water mark. Such a construction might have been applied in this case if the said grantors had owned the land below high water mark. But where the right to the latter land is only incidental to the ownership of the high land, I think it would not be separated therefrom without a special reservation in such grant, and I am unable to discover any such reservation in the deed of June 3, 1846. Besides, Welch himself does not seem to have supposed that his right to purchase from the state arose out of any such reservation, as he based it upon his alleged ownership of block 11.

I am of the opinion, therefore, that the equities are with the respondents, and that they should have a decree enjoining the appellants from interfering with their riparian rights in front of said block under and by virtue of said deed from the state, which is the extent of the relief I think they are entitled to, and that neither party should recover costs.

WALDO, C. J., and LORD, J., concurred in the result, but upon different grounds.

BROWN ET AL. *v.* SCHOOL DISTRICT, NO. 1.

Filed June 10, 1885.

TAXATION—ILLEGAL TAX—INJUNCTION.—Equity will not restrain the enforcement of an entire tax, part of which is illegal, unless the portion which is legal has been paid.

APPEAL from Clatsop county. The opinion states the facts.

C. H. Page, for the appellants.

C. W. Fulton, for the respondents.

THAYER, J. This appeal is from the circuit court for the county of Clatsop. The appellants commenced a suit in that court against the respondents, to restrain the enforcement of a certain school tax levied upon the taxable property thereof by a vote of the legal voters of a school meeting, held in the above-named district, on the fifteenth day of July, 1884. The appellants are tax-payers of said school district, and have been assessed large sums on account of said tax. The object of the tax, as appears from the pleadings in the suit, was for the following purposes, and made up of the following items, viz.: One and one-third mills on the dollar for school purposes; one and two-thirds mills on the dollar for the purpose of paying interest on the bonds issued by the district, and one-half of one mill on the dollar for the purpose of making necessary improvements to the

schoolhouse block owned by the district. It appears that said tax was assessed in due form upon the property in the district, but that the appellants refused to pay their assessments, and were returned upon the delinquent list, which was placed in the hands of the sheriff of said county for collection, as provided by law, and that the sheriff is about to sell their property to satisfy the various amounts. The appellants claim that said bonds are void, that said district had no authority to issue them, and that the attempt to levy taxes in order to pay the interest thereon, is illegal. Upon that ground they resist its collection. The respondents in the court below filed an answer to the appellants' complaint setting out all the facts in reference to the issuance of said bonds, and the objects for which they were issued, and the levy of said tax. The appellants filed a demurrer to the said answer, upon the grounds of the illegality of the bonds, which, having been overruled, and a decree entered dismissing the appellants' complaint, the latter have brought this appeal and desire this court to adjudge the said bonds a nullity. The respondents, on the other hand, claim that the bonds are valid; that the school district issued them in order to raise money to build a schoolhouse, and that the money has been received by the district, and the house built.

It will be noticed that the larger part of the tax is unquestionably legal. The one and one-third mills for school purposes, and the one-half mill for the purpose of making necessary improvements to the schoolhouse block, are unobjectionable, and it appears to this court that the appellants should have paid so much of said tax as is applicable to those purposes before they commenced their suit. It would render it, no doubt, very embarrassing to the affairs of the school district if the court were to interfere and enjoin the collection of the entire tax. If the appellants had paid off the portion admitted to be legal, they would have done equity before asking its interposition in their behalf. The authorities are not uniform upon the question as to whether or not a plaintiff's complaint should be dismissed in such a case, but this court is of the opinion that that is the better rule. If the appellants are obliged to pay the portion of the tax they claim to be illegal, they will not necessarily lose the amount paid. They can pay it under protest in order to relieve their property, and if it be illegal, can recover it back.

As to whether said bonds are good or valid, the court expresses no opinion at this time, as it is not necessary to the disposition of the case under the view entertained.

For the reasons mentioned, the decree appealed from will be affirmed, and the complaint dismissed without prejudice.

KINNEY v. HEATLEY ET AL.

Filed June 11, 1885.

ACCOUNTING—ESTOPPEL—ACQUIESENCE.—In an action for an accounting held that, under the circumstances of this case, the respondent should not be estopped to dispute the correctness of certain items in which he had previously acquiesced, for the reason that at the time of acquiescence he could not have known the facts in connection therewith.

THE DEED OF TRUST IN CONTROVERSY held not to be a mortgage.

DECREE ORDERED MODIFIED in accordance with the views expressed in the opinion.

APPEAL from Clatsop county. The opinion states the facts.

C. W. Fulton and *Raleigh Stout*, for the appellants.

J. C. Moreland and *Benton Killin*, for the respondent.

THAYER, J. This appeal is from the circuit court for the county of Clatsop. The respondent brought a suit in that court against the appellants, Heatley, Grace and Ten Bosch, trustees of the estate of the said respondent for the payment of certain debts, to compel them to account for the said estate, and to enjoin them from selling a certain part thereof.

It is disclosed by the facts in the case, that the respondent, about 1876, at Astoria, in said county, engaged in the cannery business. That he was the proprietor of a cannery, and put up fish and beef in cans for market, and sold and shipped large quantities thereof to England; that he continued in said business until the nineteenth day of February, 1878, when, in consequence of extensive liabilities that had accumulated against him, he was compelled to suspend business and compromise his debts with his creditors; that on said last mentioned day, the said respondent, at San Francisco, in the state of California, entered into an agreement with a large number of his creditors by the terms of which he agreed to execute to the said Heatley, Grace and Ten Bosch, a deed of trust and transfer of his property in the manner and form of an instrument then prepared and agreed upon, and which was to be executed by both of said parties; the said creditors agreeing on their part to extend the time of payment of their respective debts they held against him until the first day of October, 1878, and to release him from all obligation to pay said debts or either of them, and to look wholly to the property which should be transferred in said deed of trust so agreed to be made and the proceeds thereof for the payment of said debts, and that the said release should take effect upon the execution of said deed; that subsequently, and on the fifteenth day of March, 1878, in compliance with the said agreement, the said respondent executed to the said Heatley, Grace and Ten Bosch, as such trustees, a deed of trust conveying to them the said cannery, and all his real and personal property, excepting such as was exempt from execution, and also the sum of five hundred dollars in cash.

Said deed contained the following clauses and provisions, viz.: "Should said trustees deem it advisable, and for the best interest of all concerned so to do, and in that event, to procure the advancement of the necessary means and provisions for the same on the most

favorable terms that the same can be obtained to operate and conduct said business and to sell and dispose of the proceeds thereof and to apply the money and profits arising from such sale or disposition on the first day of October, 1878. First, to the payment of the necessary advances and running expenses of said business; to make the best arrangement or compromise that they can with French & Co., of The Dalles, and Thomas Monteith of Albany, Oregon, for all claims that they have against the said party of the first part, and with any and all other preferred or other creditors of said party of the first part, who have not entered into the agreement under which this deed of trust is executed. To the discharge of the debts of said party of the first part and said fishery or cannery. No interest to be allowed on any claim from the first day of January to the first day of October, 1878.

"Also, in trust to sell, dispose of and transfer any or all of the property herein transferred to said parties of the second part, not included in said Astoria fishery, or pertaining thereto, on or before the first day of October, 1878, and apply the proceeds thereof in the same manner as the proceeds, money and profits of said fishery or cannery hereinbefore authorized; but the money arising from such sales as well as that arising from the sale of salmon of the canning season or so much thereof as shall be necessary, may be applied before the first day of October, 1878, in the discharge of the advances made for operating and conducting said fishery business hereinbefore specified. And the money arising from the sales of the lots for which bonds have been given to said party of the first part, as hereinbefore designated, as well as the sums due from the sales of the said bonded lots already made, shall be applied first to the discharge of the promissory notes given for the same and thereafter as balance of sold before the first of October, 1878.

"Fourthly, but should the said trustees find it impracticable to run the said cannery, that then the said trustees shall with all convenient dispatch dispose of the property hereby conveyed, including said Astoria fishery and the property pertaining thereto, at such times as they or a majority of them shall deem most advantageous for the interest of all persons concerned, anything hereinbefore contained as to the time of such sale notwithstanding.

"And said party of the first part does hereby authorize and empower any two of the said parties of the second part to execute any of the conveyances in instruments of any name or nature, or do any act whatsoever necessary to carry out the intention of this deed with the like force and effect as if all three had joined in such action.

"Also, all trust after the first day of October, 1878, to sell, dispose of and transfer all the property herein transferred to said parties of the second part, and not then disposed of, after allowing said party of the first part sixty days to discharge the balance of said debts appropriating the property or so much as may be necessary for the same. The proceeds of such sales to be applied to the discharge of the debts, only so much to be sold as shall be neces-

sary for such purpose, and the balance of all the property after the discharge of the debts to be transferred to the party of the first part. Also,

"In trust to conduct and manage said business and property economically and in a business like manner; to keep proper and separate books of accounts and vouchers which shall always be opened to inspection by parties interested; to deposit the money arising out of said business or property not in immediate actual use in a trustworthy bank of good reputation, and to faithfully discharge the duties of the trusts herein conferred in the best interests of the creditors and the party of the first part.

"And the parties of the second part hereby accept the trusts herein conferred, and agree to faithfully perform the obligations of said trusts as herein specified."

Upon the execution of said deed of trust, the said trustees engaged in operating said cannery, and continued to operate it during the seasons of 1878, 1879, 1880 and 1881. It appears that they obtained permission of the respondent to operate it during the season of 1879, but they had no permission from him to operate it during the remaining two seasons unless it were implied. Subsequent to 1881 the said trustees sold the cannery back to the respondent. From these various sources and transactions the trustees derived a large amount of funds applicable to the payment and discharge of the said debts.

The respondent alleged in his complaint in the suit that he was informed and believed that said trustees had, prior to January, 1882, realized more than sufficient to pay all the claims against the estate. He also complained of their having sold certain real property which they were not authorized to sell under the trust deed, and that they were offering to sell other portions thereof, and that they had refused to make him a statement and accounting of the condition of the affairs of the estate, although he informed them that if it should be ascertained upon such accounting that they had not realized sufficient to satisfy all just and legal claims against it, he would advance to them the balance, and receive back the residue of the property unsold. The said trustees filed an answer to the complaint in which they set forth a statement of their account, also the claims of the creditors, who were also made parties to the suit upon motion of the counsel for the trustees. The respondent filed a reply in which he controverted many of the matters alleged in the answer, and the main question presented for the consideration of this court arises out of the issue of fact so formed. The first issue referred to involved the amount of indebtedness from the respondent to certain of the creditors at the time the deed of trust was executed. Those creditors, excepting one, the Salem Flouring Mills Co., were parties who had received from the respondent amounts of salmon and beef, either by purchase or on commission, counsel at the hearing did not exactly agree which. The respondent shipped them salmon, and they made advances to him. He was responsible for

the proper packing, and they took the risk of sea damage. The salmon not proving good, they made reclamations upon him, and in most cases he had agreed to allow them. Those accounts were between Dickson, DeWolf & Co., W. & J. Lockett, Henry Coubrough, and Ten Bosch & Co. Dickson, DeWolf & Co., are E. D. Heatley, or Campbell & Heatley. There is, however, an item as a drawback against the account of W. & J. Lockett, for amount paid by respondent in shipping certain amount of salmon from Astoria to San Francisco and placing aboard the cars. The salmon was obtained by the Locketts from the respondent to be shipped direct by vessel from Astoria to Europe, the former to pay freight, but they subsequently concluded to have it go across the continent by rail, from which circumstance the item of expense accrued. Another of the issues referred to involves the amount of compensation the trustees should be allowed for their management of the estate.

These issues and their collaterals include the main controversy between the parties. The matter of compensation of the trustees is not difficult to adjust, but the claims for reclamations of advances on the salmon are very much complicated. The respondent claims to have put up the salmon properly, but one cargo of them shipped by the Titan, arrived in Liverpool in a wretched plight. The appellants claim that it was occasioned by bad packing, but after hearing the testimony and proofs respecting it, and observed the great disproportion of spoiled cans between that shipment and others the respondent made, we are convinced that the severe stress of weather the vessel encountered upon her voyage, the effect upon her other cargo, and upon the vessel itself, caused the greater part of the damage to that lot. But the appellants' counsel contend that the respondent cannot now question the correctness of the accounts of said parties for reclamations, for the reason that he assented to all of them, and some of which he agreed especially to pay; that these accounts as between said parties stand upon the same footing as an account stated, and cannot be surcharged or falsified without clear and satisfactory proof of fraud or mistake. But we must take into consideration the circumstances under which these parties were situated. The respondent was on this coast, and the parties with whom he dealt in Europe. He shipped them the salmon under an agreement that he should be chargeable with all blown tins resulting from improper packing. After the salmon left Astoria the respondent saw nothing more of them, and he must have relied entirely upon the statements of his consignees. He reposed confidence in them, and when they advised him that the salmon had proved bad in consequence of bad packing, he would be likely to treat it as a matter of course, and to acquiesce; he evidently knew nothing at the time of the severity of the voyage or to the extent the cargo had suffered, in consequence of rough weather. He did question the correctness of the account, and insisted that the trustees should allow none that should be ascertained to be incorrect; and the evidence was very strong that the trustees and creditors agreed to it.

I cannot believe that it would be fair to hold that the respondent was bound by any admission he made as to the correctness of those accounts, or promise to pay them he is shown to have made, if, as a matter of fact, the salmon were properly put up. When the Titan reached Liverpool, it was ascertained that a large proportion of the cans containing the salmon had burst. This result, under ordinary circumstances, would have indicated improper packing, and when the consignees promptly advised the respondent of the miserable condition in which his shipment had arrived, and very emphatically informed him that it had been occasioned by improper canning, he could have done no less than acknowledge a liability to repay the advances. The consignees did not probably mention to the respondent that the vessel which transported the goods encountered such severe storms and rough sea that she lay for a long time with her lee rail under water, and straining and creaking fearfully, the sea continually washing over her decks fore and aft; that the cargo of wheat and flour was wet and spoiled; that the heat which generated in consequence was so intense that it was felt through the deck; that it scorched and blackened the woodwork in proximity to it, and that the gas and steam omitted from the hold when the hatches were off were so dense that the vessel, when at the Liverpool dock, was supposed by many to be on fire. These facts were left for the respondent to discover the best way he could, and he only ascertained them long after he executed the deed of trust. It would certainly be unjust to hold that these accounts became, under the circumstances, accounts stated. I think the question whether the salmon were improperly put up or were damaged by the sea, is an open one, and that the main damage to that shipped aboard the Titan was sea damage, and that no reclamation should be allowed the parties receiving it on account of advances made thereon; and the amounts charged in any of said accounts for such reclamations should not be allowed in favor of such parties.

The trustees should be allowed a reasonable compensation for attending to the matters of the estate, but their pretended employment of Dickson, DeWolf & Co., who were none other, as appears from the evidence, than the said E. D. Heatley himself, to make the purchases for the cannery of supplies, etc., and to sell and dispose of the proceeds of the cannery, and agreement to pay the commission of two and one-half per cent upon all purchases, and two and one-half per cent upon all sales, were not claimed by appellants' counsel to have been legal. No such arrangement could be recognized by the law as binding upon the estate. At the same time the trustees should be allowed such an amount of compensation as would cover all necessary services of that character, and we are of the opinion that the amount allowed by the circuit court ought to be sufficient.

The thirty-eighth finding of the referee, which is as follows, we think correct: "38. That in 1878 plaintiff sold and shipped to said Locketts canned salmon, at a stipulated price, c. i. f. That

subsequently Locketts directed the shipments to be made overland, they paying the extra freight. That there were so shipped eight thousand seven hundred and fifty cases. That they credited plaintiff forty-seven pounds six shillings nine and three-quarter pence too much on ocean freight to Europe, but omitted to credit plaintiff three hundred pounds six shillings ten pence paid by him in shipping the salmon from Astoria to San Francisco, and placing the same aboard the cars. That plaintiff is entitled in said account of W. & I. Lockett to a credit of two hundred and sixty-eight pounds."

The respondent's counsel contended upon the argument that the deed of trust is only a mortgage, and that consequently the respondent is not chargeable with interest. Whether interest could or not be charged in case the transaction were only a mortgage, we express no opinion; but to refuse to allow interest upon the claims of the said creditors would be very inequitable, to say the least. It may be difficult to say wherein the transaction differs from a mortgage, yet it is certainly not one. Mr. Pomeroy, in his work on Equity Jurisprudence attempts to point out the distinction in such cases, and we content ourselves upon that point by referring to section 995 of that work.

The question raised by appellants' counsel upon the argument, as to whether the appellants should have been required to pay any part of the costs of the litigation, and whether it should not all have been imposed upon the respondent, is entitled to a good deed of consideration. I would not be willing to hold that he should pay for the services of the appellants' counsel beyond that which is taxable as costs. But it seems to me that he ought to be required to pay all the statutory costs of the case. Had the respondent tendered or made a written offer to pay a sum equal to the balance still due the said creditors, I should have viewed the question differently. I can see no alternative but that the case will have to go back in order to ascertain the amount included in the accounts of said creditors for reclamation of advances made upon the salmon shipped aboard the vessel Titan. The said creditors are entitled to no such reclamations, but as the case stands now, it is impossible to ascertain that fact. When it shall be known, the overcharge in each of the accounts of said creditors can be deducted, and a decree entered accordingly. It may be a fact that when such respective amounts are ascertained and deducted, there will be nothing due upon the accounts of said W. & J. Lockett, Henry Coubrough, and H. Ten Bosch & Co., but I do not see how that can be found out until there are some data showing what portion of each of their claims was for reclamations upon salmon shipped upon the Titan. Reclamations upon salmon shipped upon the other ships are not affected. The decree to be entered in the circuit court when the fact referred to is ascertained, will be in accordance with the decree appealed from, except so far as modified by this opinion.

SUPREME COURT OF UTAH.

UNITED STATES v. CANNON.

Filed June 27, 1885.

UNLAWFUL COHABITATION—INDICTMENT—IMMATERIAL ALLEGATIONS.—Section 3 of the act of March 22, 1882, provides that "if any male person hereafter cohabit with more than one woman he shall be deemed guilty of a misdemeanor." *Held*, that an indictment for such offense, under the criminal procedure act, charging unlawful cohabitation with certain women named, need not allege that the defendant was a "male person," as the law would presume such fact, or that he cohabited with them as "his wives."

THE SAME—DESCRIPTION OF OFFENSE.—In an indictment for an offense created by statute, it is sufficient to describe the offense in the language of the statute.

THE SAME—SEXUAL INTERCOURSE UNNECESSARY.—Sexual intercourse is not a necessary element to the commission of such offense, and need not be alleged or proved. Consequently it is not error for the court to exclude evidence offered by the defense tending to show non-access during the times charged.

THE SAME—RELATIONSHIP BETWEEN DEFENDANT AND WOMEN.—On a trial of such indictment evidence of the relationship existing between the defendant and the women at and prior to the passage of the act of March 22, 1882, is admissible.

THE INSTRUCTIONS GIVEN REVIEWED, and held to correctly state the law applicable to the case. The instructions refused held to have been irrelevant and immaterial.

APPEAL from the district court. The opinion states the facts.

Arthur Brown, *Bennett*, *Harkness & Kirkpatrick*, *Sutherland & McBride* and *F. S. Richards*, for the appellant.

Dickson & Varian, for the United States.

BOREMAN, J. On the seventh day of February, 1885, the defendant, Angus M. Cannon, was indicted in the third district court for the crime of unlawful cohabitation. After trial and a verdict of guilty, he made his motion for a new trial, which was overruled, and thereupon, on the seventh day of May, 1885, he was sentenced to the penitentiary for six months and to pay a fine of three hundred dollars. From the order overruling the motion for a new trial, and from the final judgment the defendant has appealed to this court. The body of the indictment reads as follows:

"The grand jurors of the United States of America within and for the district aforesaid, in the territory aforesaid, being duly empaneled and sworn, on their oaths do find and present that Angus M. Cannon, late of said district, in the territory aforesaid, to wit, on the first day of June, in the year of our Lord one thousand eight hundred and eighty-two, and on divers other days and continuously between the said first day of June, A. D. 1882, and the first day of February, A. D. 1885, at the county of Salt Lake and territory of Utah, did unlawfully cohabit with more than one woman, to wit, one Amanda Cannon, and one Clara C. Mason, sometimes known as Clara C. Cannon, against the form of the statute of the said United States in such case made and provided, and against the peace and dignity of the same."

The appellant claims that the indictment is insufficient, and that it was error to admit evidence under it. He relies upon two alleged defects in the indictment.

First. That it fails to allege or show that the defendant is a "*male person.*"

The action is based upon the third section of "an act to amend section 5,352 of the revised statutes in reference to bigamy, and for other purposes," approved March 22, 1882, and commonly known as the "Edmunds act." The section referred to provides that "if any male person in a territory * * shall hereafter cohabit with more than one woman, he shall be deemed guilty of a misdemeanor," etc.

The name Angus is in this community recognized as that of a "male person," the defendant himself, however, being the most public character bearing the name. Outside of this community it is well recognized as a male appellative.

The word *person* embraces all mankind, and mankind is divided into two classes, one male and the other female. The statute says that this crime can be committed only by the members of one class—the male—upon and with members of the other class,—the female. When, therefore, as in the case under consideration, the specific crime is charged to have been committed by some person upon and with those of the female class, the natural and inevitable conclusion would seem to be that the "some person," committing the offense belonged to the other, the male class. The law would presume this, and its statement in the indictment would be unnecessary: Crim. Prac. Act, sec. 159, Laws of Utah, 1878, page 94.

The grand jury could not have intended to indict a female under such a statute. To have done so would have been not only irregular, but in violation of their oath. The court cannot in the absence of evidence, assume that the grand jury committed so great a folly and performed so vain a work. All presumptions are in favor of the regularity of their proceedings: People v. Mills, 17 Cal., 276; 1 Whart. Cr. Law, sec. 713; 2 Russ. on Crimes, page 732.

This is not the case of an indictment where there are different classes or kinds of persons who can commit the offense. That was the peculiar feature of the case of the People v. Allen, 5 Denio, 79, cited by the defense. In such a case it would be clearly necessary to specify in the indictment the class the defendant was charged with belonging to, for the reason that there were two classes. In the case before us, however, there could be no doubt as to the class, as there is but one class. But in the case of the People v. Allen, the title, clerk, or servant, was not so much a description of the person as it was an element in the description of the offense itself. It was a case of embezzlement, where the money had to be received by him as the clerk or servant, and in the course of his employment as such. In the case at bar, however, the word "male" can hardly be said to be an element in the description of the offense, it is simply a designation of the class of the offender. This designation of the defendant could in no way aid in establishing his identity. That was fixed by the name, which upon arraignment he admitted to be correct.

In some of the states, such as New York, Massachusetts, Pennsylvania, etc., the statutes against rape say, that: "Whosoever ravishes and carnally knows a female," etc.: Mass. Stat., 1871, chap. 55; or: "Every person who shall have carnal knowledge of any woman," etc., 2 N. Y. Rev. Stat., 663, sec. 23, is guilty of rape. The words "male person" do not appear in the statute, yet it is a well known fact that no one but a "a male person" could be indicted for such an offense. In a prosecution under such a statute, the court is required to presume, from the very nature of the offense itself, not only that the defendant named therein is a "male person," but it would of necessity have to go one remove farther, and presume the words to be in the statute, that is, that the statute, although it did not say so, meant to apply to "male persons" alone. How much stronger is the case before us where the statute is express and the court has to presume only as to the indictment. We think it is a settled general doctrine that in rape cases, even under the strict rules of the common law, it is not necessary to aver, in the indictment, the sex of the defendant: 2 Whart. Cr. L., sec. 1,154; 2 Bishop's Cr. Proc., sec. 901, ed. of 1866; People v. Colton, 2 Utah, 457.

In the cases like the one under consideration, it is generally unnecessary to aver the sex in the indictment: Bishop St. Crimes, secs. 700, 705–6–7.

A case there referred to was where the indictment charged "that Daniel McLeod and Delany Waters, *alias* Lany Waters, did live together in a state of adultery and fornication." The name Daniel is a well known male application, but "Delany" or "Lany" would seem to be as well suited to male as to female persons. Yet, in that case, the court held that it was not necessary in the indictment to state the sex: McLeod v. The State, 35 Ala., 395.

The same rule that would apply to rape, adultery, and lascivious cohabitation cases, would apply to other classes of cases, in regard to other words. For example, the statutes against murder say that murder is the unlawful killing of a *human being* with malice aforethought. Yet in an indictment for murder it is not deemed necessary to allege that the victim was a *human being:* 27 Cal., 507. In every such case it is conclusively presumed that the deceased was a human being, as there is no such crime as the murder of an animal or an inanimate thing. And further, the statute does not say in express words, that the unlawful killing must be the work of a human being in order to constitute a crime, yet the courts, from the very nature of the offense, do so hold. Not only so, but they go further and presume the defendant who is charged with the crime, to be a human being of a particular class, namely, one of responsible age and of sound mind.

A California statute says, that "any person of the age of fourteen years and upwards who shall have carnal knowledge of any female child under the age of ten years," etc., "shall be guilty of the crime of rape." The supreme court of that state holds that in an indict-

ment under that provision, it is not necessary to aver that the defendant is over fourteen years of age; that the defendant's capacity to commit the crime is an element in the crime: People v. Ah Yek, 29 Cal., 575, citing Com. v. Scannel, 11 Cush., 548. So, if in the case before us, it should be considered that the defendant's capacity to commit the crime be an element in it, yet it is not necessary to state, in the indictment, that he is a "male person." But as stated above, we do not consider the words "male person" any element in the description of the crime. It would show that he belonged to the class which alone was capable, but it would show that he individually was capable, or that he was not of irresponsible age, or not of unsound mind.

The cases of *Ex parte* Hedley, 31 Cal., 108, and The Com. v. Libbey, 11 Met., 64, referred to by the defense on this point, do not seem applicable. They were both cases of embezzlement, and no question was raised as to the sufficiency of the indictment in either case.

We do not see wherein the insertion of the words "male person" would have aided the defendant in his defense. He could not thereby have been enabled to make any other or different defense than he has made. It would not have enabled him to understand any better the nature of the crime charged. If he has not been prejudiced in respect to his substantial rights he cannot complain: Crim. Proc. act, sec. 479; laws 1878, 165; amended laws, 1884, 126.

We conclude, therefore, that it was not necessary to designate the defendant, in the indictment, by the words "male person." The fact, however, that he is a "male person" does appear from the indictment, taking it altogether, including the context, the nature of the offense and the recognized application of the name to male persons.

Second. It is claimed that the indictment is defective in not alleging that the defendant put forth any pretense of marital relation to the women mentioned. The appellant holds that the court has no right to interpolate words into the statute which the law-making power never intended to be there. That proposition, as a general rule, is undoubtedly true. But, in the case in hand, there is no interpolation. The question is on the indictment, and it shows no interpolation, but if it exists it is in the interpretation of the words used in the statute and in the indictment. It is insisted that if the court construes the third section above specified as being confined to matrimonial cohabition, it is wrong; but that if it is right, then the indictment is defective in not alleging that defendant cohabited with these women *as wives*. So far as the objection to the indictment goes, it is not a question as to whether it is defective if some peculiar construction be adopted, but whether it is defective in law, without any conditions. If it be assumed that the words, "as wives," according to the suggestion in one of the briefs of appellant, were added in the indictment, would the alleged defect be cured? Exactly the same objection would arise as now arises, without the addition of those words. The question would still remain, what is

the meaning of the words "to live or dwell together as husband and wife?" The trouble, therefore, would not be ended if the suggestion of appellant were complied with. The addition of such words to that already in the indictment, would be mere tautology, and would give the appellant no information as to the character of the charge against him that is not found in the indictment as it now stands. From the position taken afterwards in the briefs of the appellant, although the point is not made against the indictment, it is apparent that appellant holds that still other additions should be made to the description of the offense in the indictment. But as such particularity would not be required even in a murder case, we do not think it would be required in a case of misdemeanor. It is never necessary to detail in an indictment all the facts which the prosecution expect to prove, in order to make out a case, nor is the defendant ever entitled to them. He is entitled to a plain and concise statement or description of the offense charged against him, in order to be enabled to make his proper defense and to enable him to plead a conviction thereunder in bar of another prosecution for the same offense.

In the construction of penal statutes care must be taken not to put such a construction upon the language as would include the innocent as well as the guilty. The evil to be guarded against must be kept in view: Com. v. Stout, 7 B. Mon., 249.

We will not likely go astray, if, with this rule always before us, we keep in remembrance that other indispensable rule, namely, that the intention of the legislature must be sought and followed, except that the construction must not be repugnant to the clear meaning of the words used.

With these rules to guide, the cases cited by appellant under this second heading are clearly not inconsistent with our views of the proper construction to be put upon the statute under consideration. The only object of those references is to show that the indictment should have added the words "as wives," to the word "cohabit," and this we have shown would have availed nothing.

The offense with which the defendant is charged is purely statutory, and it is a new offense in our statutes. It is a general rule, well settled, that in an indictment for an offense created by statute, it is sufficient to describe the offense in the language of the statute: People v. Colton, 2 Utah; People v. Cronin, 34 Cal., 191; Lodano v. State, 25 Ala., 64; People v. Murray, 6 West Coast Rep., 643, California case.

The supreme court of the United States say that where a person is indicted for a purely statutory offense, it is sufficient in the indictment to charge the defendant with acts coming within the statutory description in the substantial words of the statute without further expansion: U. S. v. Simmons, 96 U. S., 360.

Where a new offense has been created by statute without reference to anything else, it will be sufficient to describe the offense in

the terms of the act: People v. Saviers, 14 Cal., 29; People v. Shaber, 32 Cal., 38.

To the general rule of describing statutory offenses in the language of the statute there are exceptions, the principle ones being (1) when the statute makes that an offense which was an offense at the common law, and (2) when the offense is described in the statute in terms too general. The cases cited by the appellant come within the one or the other of these exceptions. As we have shown above, the indictment in the present case would have been no more certain and plain than it is even if the definition of the word cohabit had been embraced therein. The word has an established meaning and the indictment gives such particulars of time, place and names of the women, as to inform defendant wherein he was charged with having violated the law. If the case falls within either of the exceptions to the general rule and would require more particularity, it has not been shown. It was the duty of the appellant to have done this: State v. Abbott, 31 N. H., 434; 1 Whart. Crim. Law, sec. 364.

The alleged offense is not claimed to have been an offense at common law, therefore it does not fall within the first of these exceptions, and it does not fall within the second exception unless the description is language too general to give the defendant information to which he is entitled to enable him to prepare his defense or to plead the judgment hereafter in bar of another prosecution for the same offense, or too general to guide the court in passing sentence. If the indictment had charged the defendant with "cohabiting with more than one woman," without giving the names of the women, or without time and place, it would have been insufficient in not giving particulars so as to enable defendant to make proper defense or to plead the judgment hereafter.

In the exposition of a statute the intention of the legislature is to be sought and followed, unless by doing so the construction to be given is repugnant to the clear meaning of the words, and if the meaning of the words is plain and obvious the only safe course is to suppose the legislature intended those things which the words denote: Taylor v. Leoni, 20 Mich., 155. If the language is clear, it is conclusive, and the words must not be narrowed down to the exclusion of what the legislature intended to embrace, but the intention must be gathered from the words. That sense of the words should be adopted which best harmonizes with the context and promotes in the fullest manner the policy and objects of the legislature: U. S. v. Hartwell, 6 Wall., 385.

What then was the object of the congress in enacting this statute? It was, judging from the whole act, intended to be an aid in breaking up polygamy and the pretense thereof. The well recognized difficulty of reaching the polygamy cases by reason of having to prove marriage, and by reason of the fact that the statute of limitations bars prosecutions after three years, no doubt led congress to pass this act. It was sought to break up the polygamic relation.

It was necessary in effect to make polygamy a continuous offense, without requiring proof of marriage. Whether marriage took place or not, the pretense of marriage—the living, to all intents and purposes, so far as the public could see, as husband and wife—a holding out of that relationship to the world were the evils sought to be eradicated. Although aimed primarily at such a relationship, it reaches out and embraces all men, living and dwelling with more than one woman as if they were married, whether any marriage had ever taken place or not. It was living and dwelling together under the appearance of being married. The appellant insists that cohabitation necessarily includes sexual intercourse, and that there can be no cohabitation without it. We find nothing whatever in the language or context to lead us to believe that congress meant to apply the statute to lewd and lascivious cohabitation, which would be the case if the construction contended for by the appellant were correct.

The primary meaning of cohabit, is to dwell with, *con*, with, and *habere*, to dwell, and at the present day it is generally held to mean to dwell or live together as husband and wife, or to dwell or live together in the same company, place or country: Calef v. Calef, 54 Me., 365; Com. v. Calef, 10 Mass., 159; Ohio v. Connoway, Tappan Ohio, page 90.

This meaning is recognized in appellant's brief, page 4, where it says that " in looking to the common signification of the word cohabit we find but two meanings, one broad and generic and including all residents of the same ward, town, city or even country, and the other the living together as husband and wife." The brief proceeds to place the construction upon the latter words, which we have here referred to, and which we do not think are warranted.

That learned author, Mr. Bishop, says that he knows of no legal authority or usage that would embrace sexual intercourse in the word cohabitation, except the casual misapprehension of chancellor Walworth in Dunn v. Dunn, 4 Paige, 425, 428; 1 Bishop's M. & D., section 777, note 1, 4th ed.

The authorities of the appellant on this point do not shake the position that cohabitation does not include sexual intercourse. The word does not even include necessarily the occupying the same bed: 2 Paige Ch. R., 425.

In Foster v. Foster, 1 Hag., 144, where matrimonial intercourse was sought to be enforced between man and wife, the court drew the distinction plainly between "*matrimonial intercourse*" and "*matrimonial cohabitation*," holding that " the duty of matrimonial intercourse " could not be compelled, but that " matrimonial cohabitation " could be.

The case of Orme v. Orme, 2 Eng. Ec., 354, was brought by the wife against her husband for restitution of conjugal rights. The libel admitted that the complainant was " allowed by the said Robert Orme to reside in the same house with him," and the court held that this admission of " cohabitation " admitted the complainant out of

court, and that she might have been restored to cohabitation, yet, as that was admitted to exist, and the court could go no farther, that the court had no power to restore the complainant to matrimonial intercourse with her husband.

Had it been the intention of congress to include the common sexual vices in this provision, it appears unreasonable that it should not have said so. It evidently did not intend to include lewd or lascivious cohabitation; for, had it so intended, it would have added those words. When the bill was under consideration in congress, their attention was specially called to the matter, and it could not, therefore, have been an oversight. A member (Mr. Singleton) offered an amendment, whereby it was proposed to reach all of the sexual vices, and to punish adultery, fornication, open and notorious lewdness, etc.; but the amendment was voted down: Congressional Record, March 15, 1882.

Thus congress clearly gave expression to their view, that no such offenses were to be embraced in the act. The crimes which congress proposed to punish were such as a large part of the people, especially in this territory, were upholding and practicing. The other vices were such as all people disapprove, and hence congress left their suppression to the local authorities. The interpretation we have given to this provision—the third section—is, as we think, the one best calculated to effect the object intended by congress and to suppress the evil.

Hence, independent of the statutes of this territory governing pleadings in criminal cases, we think the indictment is sufficient; that it was not necessary to have added the words "as wives" to the description of the offense as set out in the indictment, nor to have given any particulars of the facts necessary to be proved, beyond what were given, and especially that it was not necessary to allege anything in regard to sexual intercourse.

We have, however, a criminal procedure act in this territory which governs the mode and manner of criminal pleading; and we now come to consider that act, and see what effect it has upon the matters necessary to be stated in the indictment.

The criminal procedure act of this territory is to the criminal practice what the civil procedure act is to the civil practice: 27 Cal., 507.

As we are bound by the criminal procedure act, it is unnecessary to inquire what was the rule at common law when the statute speaks: People v. West, 49 Cal., 610; People v. Murphy, 39 Cal., 52; People v. Cronin, 34 Cal., 191.

The criminal procedure act says:

"All forms of pleading in criminal actions and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this act:" Utah Laws, 1878, p. 91.

If the indictment will stand the test of these rules, it will be sufficient, no matter how much it might fall short of what would have been necessary at common law: People v. King, 27 Cal., 510; Peo-

ple v. Dick, 37 Cal., 277; People v. Cronin, 34 Cal., 191; People v. Murphy, 39 Cal., 52.

In section 150 of the criminal procedure act it is provided what the indictment must contain. After specifying that it must give the names of court and parties, it says the indictment must contain "a clear and concise statement of the acts or omissions constituting the offense, with such particularities of the time, place, person and property as will enable the defendant to understand distinctly the character of the offense complained of and answer the indictment." A form of indictment is given. Section 151 provides that the indictment must be direct and certain as it regards, (1) the party charged; (2) the offense charged; and (3) the particular circumstances of the offense.

Section 158 specifies that the indictment will be held good if it can be understood from it (amongst other things not here brought in question), so far as the description of the offense goes, "that the act or omission charged as the offense is clearly and distinctly set forth, without repetition, and in such manner as to enable the court to understand what is intended, and to pronounce judgment upon a conviction, according to the right of the case."

To have enabled the defendant to answer the indictment it could not have been necessary that he should have been apprised of the fact by express averment that he was a *male person;* nor could it have been necessary, as we have seen, to make him to understand the character of the offense charged and to answer it, that the offense should have been otherwise or more particularly described than has been done. The offense is clearly and distinctly set forth—there is no repetition—and it is set out in manner sufficient to enable the defendant and the court to understand it, and to guide the court in pronouncing judgment.

If appellant thought the indictment defective in either respect, he should have demurred: Crim. Proc. act, sec. 192; laws of Utah, 1878, 101. The defects were such as could have been reached by demurrer. As appellant did not demur; he waived his objections: Sec. 200 of Crim. Proc. act; People v. Swensen, 49 Cal., 388. By said section 200 it is provided that all objections mentioned in section 192, authorizing demurrer, if they appear on the face of the indictment, can only be taken advantage of by demurrer, except that the objection to the jurisdiction of the court over the subject matter of the indictment and the objection that the facts stated do not constitute a public offense, can be taken at the trial, under the plea of not guilty, or after trial in arrest of judgment. The objections urged are such as appear on the face of the indictment, and neither objection goes to the jurisdiction of the court. If, then, the indictment alleges facts sufficient to constitute a public offense, it is sufficient, and there is no remaining objection to the indictment that the appellant can raise after having failed to demur. We have already seen that a public offense was clearly and concisely alleged.

The appellant, however, raised the objections at the trial, claiming that the indictment was too defective to allow of the admission of any testimony under it. Yet from what we have said, it plainly appears that there were no grounds for the objections, and that if there were they had been waived.

We are brought now to the consideration of the alleged errors in excluding testimony offered by the defense. Several questions were by the defense, asked a witness for the prosecution, which were objected to by the prosecution as irrelevant, immaterial and incompetent. The avowed object of these questions, as stated by the defense, was to show or tend to show non-access during the time charged, and as tending to disprove any presumption of sexual intercouse which might be raised by the testimony of the witness. The objections were sustained. The defense made an offer of proofs, the gist of which was to the same effect. Part of the offer was wholly hearsay—where he sought to show what was told the woman—a large part was wholly made up of admissions, and the residue bore upon the question of sexual intercourse and occupying the same bed. We have already seen in this opinion that sexual intercourse was not a necessary element in the crime. If it were an element—a necessary element— as the defense claim, then the prosecution might have shown that the defendant and these women lived together, in the same house and company, that they were continually walking, talking, acting as if husband and wife, treating each other so before their neighbors and the public generally, calling each other husband and wife respectively, having all their dealings before the world as if husband and wife—he might be providing for all her wants of clothing, food, house and household affairs, and claim the women as his wives, and doing many more like things, and yet if the prosecution did not prove that defendant had sexual intercourse with these women, the prosecution would have to fail. The prosecution would have to prove adultery when adultery was not charged, would have to prove fornification and lewd and lascivious cohabitation, when none of these charges had been made, and all such offenses had been purposely left out of the act by the law-making power. It seems to us preposterous that congress could ever have intended such a thing when the law was enacted. Congress never could have intended to include those things which it purposely excluded. If the sexual intercourse and bedding together were not parts of the offense necessarily, what advantage could it be to a defendant to disprove the existence of such things, especially when it would be the duty of the court—and it was done in this case—to instruct the jury that sexual intercourse and bedding together were not necessary parts of the offense. What is the advantage of introducing in evidence facts which immediately thereafter the court will have to rule out or declare of no importance. We do not think that the defendant could in any way be harmed by the rejection of such evidence. Its admission would not disprove nor tend to disprove any testimony by the prosecution. It would only tend to

disprove that which the court correctly instructed the jury was not important.

The appellant urges as error the refusal of the court to give instructions asked by him. There were twenty-four such instructions, between many of which there was but a shade of difference. The first and second of these instructions affirmed the existence of the Edmunds act and its applicability to this territory. They were wholly immaterial and irrelevant. Their rejection could in no way have affected the result. The jury take the law from the court, and it is not their province to know or to be informed where the court obtained the law.

The third rejected instruction, having reference to the non-applicability of the act to persons cohabiting with lawful wives, has no application to the evidence in the case.

The fourth, fifth, sixth, seventh, eighth, ninth, eleventh, eighteenth and twenty-first have direct reference to sexual intercourse and are wholly outside of the case and not applicable.

The thirteenth is misleading, it has reference to fathers not being compelled to break off all communication with the mothers and the children. It would indirectly lead the jury to believe that the acts of the defendant in regard to the women were perfectly justifiable.

Nos. 14, 15, 16 and 17, have reference to the evidence of the relationship existing between the defendant and the women, at and prior to the passage of the Edmunds act, and indirectly raise the question as to the competency of such evidence.

In California a man was being tried for the alleged murder of his wife. A witness upon being questioned, said that about *a month before* the homicide, the deceased wife came to her house greatly excited, and when she came, the defendant in the case had been heard swearing and breaking doors, windows and other things in his own house, and that this was going on for sometime. The defense objected to the testimony but it was admitted, the court holding the admission proper, and that these circumstances, although occurring some time before the homicide, taken in connection with the circumstances of the homicide, were proper for the consideration of the jury; that these facts tended to show the feeling of the defendant toward his wife and his treatment of her, although this was before the homicide, and in some degree they tended to show a motive for taking the life of the wife: People v. Kern, 61 Cal., 244

The case of Badger v. Badger, referred to by the defense upon another point, recognizes the doctrine that a meretricious intercourse in the beginning is presumed to continue unless there be evidence of a change: 88 N. Y., 546; Theyer v. Theyer, 101 Mass., 111. The principle of these cases applies to the case under consideration.

The evidence of what occurred prior to the date alleged in the indictment and prior to the passage of the law, was proper for the consideration of the jury, and the jury were, notwithstanding, in-

structed that they must presume the defendant to be innocent until the contrary be shown. It is not proper nor necessary, although it is sometimes done when no objection is offered, to tell the jury specially that they were at a particular time and before the time alleged in the indictment to presume him innocent, but the charge of the court covers all time down to the closing of the case by verdict. Such charge of court could not have misled the jury, for they find the defendant guilty as charged, and he is charged with an offense between certain dates. The rejected instructions could have done the defendant no good, their rejection certainly did him no harm. It is no doubt error to refuse to give an instruction asked and which is material, and has not been given in or covered by the charge; but it is not error to refuse immaterial requests: People v. King, 27 Cal., 507; People v. Kelly, 28 Cal., 423; People v. Strong, 30 Cal., 151; People v. Lachanais, 32 Cal., 433; People v. Ah Kong, 49 Cal., 6.

The tenth instruction asked by defense and refused has reference to what rule the court should adopt in the interpretation of the statute. It might properly be addressed to the court, but it was a matter with which the jury had nothing to do.

The twelfth instruction refused, had reference to the legitimizing of polygamous children. It was wholly irrelevant and immaterial.

The twenty-second, twenty-third and twenty-fourth instructions refused, have reference to the necessity of showing marriage or marriage ceremony. No ceremony of marriage is necessary to be shown in this class of cases. The instructions were therefore irrelevant and immaterial.

The twentieth refused instruction—relating to the holding out of Clara C. Cannon as wife—is covered by the charge given. In some of the instructions refused, there may have been isolated sentences that were proper, but we think that in every such instance, it is covered by the charge.

The next error assigned is the giving of the instructions by the court, as embraced in the charge.

The court gave the time within which the offense was charged to have been committed, and stated what the charge was, and then detailed, in general terms, classes of circumstances which would, if proven, make out such a case as would authorize the jury to find defendant guilty. The court charged upon the question—the most vital in the whole case—the question of sexual intercourse—and correctly so charged, and the court reminded the jury of the presumed innocence of the defendant, and that they were the judges of the credibility of the witnesses, etc. We cannot see wherein the court has failed to cover the whole case in the charge. If there be any errors at all, they are unimportant, and for such errors courts will not reverse: People v. Varnum, 53 Cal., 630.

The charge must be taken as a whole, and if it fairly and correctly presents the law bearing upon the issues, the appellate court will not

disturb the judgment: People v. Hortad, 63 Cal., 288; People v. Welch, 49 Cal., 174.

It is on the defendant's motion for new trial urged that the verdict should have been set aside because one Johnson, a juror, was a bigamist. The affidavits, as to the incompetency, are not embraced in the bill of exceptions, and hence are not properly before us: People v. Stonecifer, 6 Cal., 405. But if they were, the verdict could not be set aside: Peopel v. Lewis, 5 West Coast Rep., 259; sec. 188, Laws of Utah, 1878.

For the reasons stated throughout this opinion, it is apparent that the overruling of the motion for a new trial was proper, and the judgment was correct.

The order and judgment of the court below are affirmed.

ZANE, C. J., concurred.

POWERS, J., CONCURRING. Although I agree with the majority of the court in the construction of the word "cohabit," as used in the "Edmonds act," so-called, and also in the result reached, I am unable to concur in the conclusion that there is no error in the record and I have, therefore, deemed it proper to express my views as to the whole case.

The indictment charged that the defendant "Angus M. Cannon, late of said district, the third, in the territory aforesaid, to wit: on the first day of June, in the year of our Lord, one thousand eight hundred and eighty-two, and on divers other days, and continuously between the first day of June, A. D. 1882, and the first day of February, A. D. 1885, at the county of Salt Lake and territory of Utah, did unlawfully cohabit with more than one woman, to wit: one Amanda Cannon, and one Clara C. Mason, sometimes known as Clara C. Cannon, against the form of the statute of the United States in such case made and provided, and against the peace and dignity of the same."

The main controversy arises over the construction of the word "cohabit." The prosecution contend that it means to dwell together as husband and wife, that it does not necessarily include intercourse between the sexes, and that the law clearly distinguishes "matrimonial cohabitation" from "matrimonial intercourse."

Upon the part of the defendant, it is contended that all cohabitation which the law deals with is sexual cohabitation. That the word, as used, means a dwelling together by male and female adult persons, in the intimacy of husband and wife, and that sexual intercourse is necessarily implied.

Eminent counsel have argued the case with marked ability, and its importance, not only to the defendant, but also to the people, demands that it should receive the most careful consideration of this court.

1. In order to correctly understand what is meant by the statute when it says, "if any male person in a territory * * * hereafter *cohabits* with more than one woman, he shall be deemed guilty of a

misdemeanor," let us endeavor to ascertain what was the object that congress had in view in the passage of the act, what was the evil it sought to remedy, and what was the mischief it aimed to suppress.

If we consider the evident purpose of the "Edmonds act," and view it in the light of the exigency which caused its enactment, the conclusion seems inevitable that its purpose and intent is to protect monogamic marriage. It does not appear that its aim is to punish mere sexual crimes. This seems to have been the view taken by congress: See Congressional Record, March 15, 1882, p. 34; but, however that may be, it seems to be the view that is supported by reason and authority.

Marriage, as understood in Christendom, means the "voluntary union of one man and one woman, to the exclusion of others." The term, therefore, is not correctly applied to the union of one man with more than one woman: Story on Conflict of Laws, 8 ed., 184, note. It is the parent and not the child of society, for it is the very basis of the whole fabric of civilized society: Story on Conflict of Laws, 185. It is something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation and extent of obligation, different from what belongs to ordinary contracts: Story, 185. No legislation can be supposed, more wholesome and necessary, in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the union, than that which seeks to establish it upon the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement: Murphy v. Ramsey, 114 U. S., 45. Marriage is the foundation of the home, and upon it is builded the entire superstructure of society. It finds its defense in every human heart, which jealously guards the one object of its affection. It is the outgrowth of progress and enlightenment, for it recognizes that the wife and mother is the equal of the husband and father.

There is far more to the marriage relation than the mere gratification of passion, or the procreation of children. The wife, taking her place by her husband's side, his equal, his counselor, his friend, makes of him a perfect man. Together they share the sorrows of life; together they enjoy its blessings. When each is true to the other, they present a union not made by man, and as they pass along life's pathway, their very example is of infinite benefit to mankind. Anything which tends to bring this relation into disrepute is an injury to the world. Anything which lowers the popular appreciation of the relation and destroys the good that marriage does the world by mere example, is an evil which the law should correct.

Society with all its ramifications being founded upon marriage, it is upon grounds of public policy that it is regulated and protected.

When the act in question was passed, congress was aware that in some of the territories, there are people who believe that it is right for a man to take and live with more than one wife. That there are men who not only marry more than one woman, but who say to the world by conduct and by words, that two or more women with whom they are living are their wives. The lawmaking power saw that the mere fact of a plural marriage is an evil example. That the living and associating with two or more women as if married to all, tends to weaken the popular appreciation of true marriage, and this is detrimental to society. Therefore, for the purpose of protecting the marriage relation, the law under discussion was passed. It is directly aimed at the suppression of polygamy and the polygamous household as an evil example, dangerous in its tendency to the family relation as recognized by this nation. It was not the offense against chastity merely, but the offense against the family, which congress intended to suppress. To accomplish its object the law has several provisions. It provides for the punishment of offenders by the courts, and by restricting their political privileges. It will be necessary to refer to two or three of its sections.

"Sec. 1. Every person who has a husband or wife living who, in a territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single, and any man who hereafter simultaneously, or on the same day, marries more than one woman, in a territory or other place over which the United States have exclusive jurisdiction, is guilty of polygamy, and shall be punished by a fine of not more than five hundred dollars and by imprisonment for a term of not more than five years; but this section shall not extend to any person by reason of any former marriage, whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, on the ground of nullity of the marriage contract."

Under this section "the crime of bigamy or polygamy consists in entering into a bigamous or polygamous marriage. Continuing to live in that state afterwards is not an offense, although," as we shall see later on, "cohabitation with more than one woman is:" Murphy v. Ramsey, 114 U. S., 42, 43. As will be seen from the construction placed upon this section by the supreme court of the United States, and quoted above, it is the fact of marriage with two or more persons that constitutes the offense. It is plain that the first section of the act deals simply with the marriage relation. This section does not punish offenders for cohabitation or sexual intercourse but for entering into a bigamous or polygamous marriage: Ibid. Proof of the marriage is all that is essential.

The third section of the act reads as follows:

"Sec. 3. That if any male person, in a territory or other place over which the United States have exclusive jurisdiction, hereafter

cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months or by both said punishments in the discretion of the court."

When these two sections are read together they seem plain. One makes the fact of marriage an offense, without reference to cohabitation or sexual intercourse. The other makes unlawful the cohabitation, or appearance of marriage. Previous to the act becoming a law, many had contracted bigamous or polygamous marriages and were living with their wives. The object of the third section obviously, is to put an end to polygamous establishments. It was designed to meet cases which the first section could not. Many prosecutions for polygamy might be barred by the lapse of three years by section 1,044 of the revised statutes of the United States, and yet a man might be living with more than one woman as a husband lives with his wife, and by his example be doing the public positive injury. The fact whether he does or does not have sexual intercourse with the women with whom he is associating as a husband associates with his wife, is a matter of but little moment when compared with the greater wrong done to society.

Another section of the statute I quote:

"Sec. 7. That the issue of bigamous or polygamous marriages, known as Mormon marriages, in cases in which such marriages have been solemnized according to the ceremonies of the Mormon sect, in any territory of the United States and such issue shall have been born before the first day of January, A. D. 1883, are hereby legitimated."

Thus, by these provisions. congress says, in substance, there must be no more plural marriages. The children born or begotten at the time of the passage of the act, are legitimate, but hereafter they are illegitimate; and no male person can live with more than one woman as his wife. It would seem that the word "cohabit" implies or means no more than the outward appearance of a living with two or more women as a husband lives with his wife.

If this is so, then the prosecution, in order to make out a case, are not required to satisfy the jury that the parties indulge in sexual intercourse. Neither would it be a defense for a man accused of unlawful cohabitation to prove that he did not indulge in sexual intercourse with the women whom he held out to the world as his wives, or, in other words, with whom he cohabits.

II. The defendant claims that there are two defects in the indictment.

1. That it fails to show that the defendant is a "male person."

2. The indictment does not allege that the defendant put forth any pretense of marital relation to the women therein mentioned.

I agree with my brethren, that the indictment is sufficient. The sex is sufficiently shown, if that is necessary, by the name Angus. I think it would not mislead the defendant, and it is not claimed

that he is not the man named. The precise words of a statute need not be followed in order to make an indictment valid.

The indictment follows the language of the act in describing the offense. This seems to be sufficient, particularly in statutory misdemeanors, and it may be laid down as a general rule to which there are few exceptions: State v. Rust, 35 N. H., 438; U. S. v. Mills, 7 Pet., 138, 432; U. S. v. Gooding, 12 Wheat., 460, 281; 1 Wharton Cr. Law, section 364; Romp v. State, 3 Greene, Iowa, 276; Chambers v. People, 4 Scan., 451; State v. Kegan, 22 Mo., 459; State v. Mitchell, 6 Mo., 147; Simmons v. State, 12 Mo., 268; Whiting v. State, 14 Conn., 487; People v. Colton, 2 Utah, 457; People v. Thompson, 4 Cal., 238; People v. Savier, 14 Cal., 29; People v. Martin, 32 Cal., 91; People v. Cronin, 34 Cal., 191, 208. Besides, the defendant failed to demur specially, and if there was any defect it was waived: Crim. Prac. Act, section 200. But there does not appear to be any defect, as the indictment clearly meets the requirements of the criminal practice act: See Cr. Prac. Act, section 158.

III. On the trial, Clara C. Cannon was sworn as a witness for the prosecution. She testified as follows: "I know the defendant. I have been his wife. I was married to him about ten years ago, and have since lived at 246 First South street, Salt Lake City. I live there now, and have lived in the same house since shortly after I was married. The defendant has lived in the same house part of the time, and in the same house during the past three years. I have one living child, which was the child of that marriage, born January 11, 1882. I have had two other children by that marriage, both born before the living one. In this house I occupied two rooms on the ground floor—a parlor, and a dining room, on the east side. My kitchen is back, not attached to my part of the house. I have occupied this part of the ground floor since I first went to live in the house. There is a hall running through the house on the ground floor, and the rooms I occupy on that floor are on the east side of the hall. I know Amanda C. Cannon. She has lived in the same house that I live in during the past three years. She has occupied, on the ground floor, two rooms on the west side of the hall, beside her kitchen, which is attached to the back of the main building, and is not the kitchen I use. I suppose Amanda Cannon is defendant's wife. I have heard him speak of her as his wife, as Mrs. Cannon, and she has lived in the same house ever since I went to live there. She has nine children, I think. During the past three years, I think, all her children have been living there at home, but not all the time. My child lives with me, in my part of the house—I mean the child of this marriage. The children of Amanda Cannon live with her in her part of the house. During the past three years, and prior to the month of February in this year, the defendant has been in the habit of taking his meals with me, in my part of the house, a portion of the time, about one-third of the time. There was stated intervals; he took his meals with me every third day—with me and my children. I have a son and a daughter, grown up, and two or-

phan children. He took his meals with me and the child of this marriage, and the other children, every third day. He took his meals with Amanda Cannon and her family one-third of the time. He took all three of his meals with me every third day—on week days, and on Sunday morning he had breakfast at my house—that is, he took his meals with me two days of each week, and also his breakfast Sunday morning, which made one-third of the time. On Sunday he took his dinner at Sarah's and his supper at Amanda's. There are four rooms on the second floor of the house, used as bedrooms, and a hall, with two of the rooms on either side of it. The rooms open into the hall. During the past three years I have occupied the bedroom in the northeast corner, and Amanda has occupied the one in the southwest corner of the house. The defendant has occupied the bedroom in the southeast corner. The room occupied by me as a bedroom, and the one occupied by defendant as a bedroom, are on the same side of the hall, and there is no intervening room."

On cross-examination, the witness was asked by counsel for defendant, several questions, the purpose being, as stated, as "tending to show with other evidence to be given, non-access during the time charged in the indictment, and as tending to disprove any presumption of sexual intercourse which might be raised by the testimony of the witness."

The prosecution objected to each question, on the ground that it was immaterial, irrelevant and incompetent. The court sustained the objection and defendant excepted.

I think there can be no question but what this testimony was admissible. True, the fact that the defendant did not have intercourse with these women would not be a defense, but in view of the evidence elicted by the prosecution, it became proper. The court in his charge could have instructed the jury as to the weight to be given to this evidence. We must remember that these questions were asked in cross-examination, and that great latitude is allowed. We must bear in mind, also, that the prosecution had shown on the direct examination, that the defendant occupied a bedroom adjoining that of the witness, there being no intervening room. The evident purpose of the prosecution in eliciting this testimony was, to enable the jury to infer that the parties enjoyed sexual intercourse. That is the natural inference that would be drawn from such testimony, and the defense were entitled to rebut it. That the prosecution understood that such an inference would be readily drawn, is shown by their brief in the Musser case—a similar case to this, and argued at the same time. In that brief, speaking of the proof showing cohabitation, it is said: "His, Musser's, bedroom is between the bed-chambers of the women, and open doors afford ready and easy access to the marriage beds." It is plain that the testimony is open to the inference that I have drawn from it.

On cross-examination, anything that will explain, modify, or cut down the testimony drawn out on the direct is proper. "A party

always has the right to call out on cross-examination, any facts within the knowledge of the witness, which has a tendency to affect or qualify the evidence he has given in chief, whether it points to the same circumstances about which he testified or not. A more restricted rule renders cross-examination in many cases nearly valueless, and enables a party by careful questions to his witness, to give to the jury a one-sided and partial view of the facts within the knowledge of the witness, and effectually to preclude the opposite party from supplementing the witness' statement, with the further facts within his knowledge concerning the same transaction, unless he shall make the witness his own, in which case he is supposed to vouch for him as credible, and has also a less privilege of searching examination: Det. & M. R. R. Co. v. Van Steinberg, 17 Mich., 100.

IV. With regard to the charge of the court the error lies not so much in what the judge did say as in his failure to say what he ought. This case belongs to a class that creates great public interest. Men have strong prejudicies and are prone to follow their prejudices, whether they are fully borne out by testimony or not. Therefore, a court, which should always be fair, always be calm, and no matter what the public may demand, should always mete out impartial and even-handed justice, should carefully throw about a defendant the safeguards to which the law says he is entitled. The charge to the jury was remarkably brief. It was as follows:

"The indictment in this case charges that the defendant, on the first day of June, in the year of our Lord 1882, and on divers other days continuously between said first day of June, 1882, and the first day of February, 1885, did unlawfully cohabit with more than one woman, to wit: One Amanda Cannon and one Clara C. Mason, sometimes known as Clara C. Cannon. If you believe from the evidence, gentlemen of the jury, beyond a reasonable doubt, that the defendant lived in the same house with Amanda Cannon and Clara C. Cannon, the women named in the indictment, and ate at their respective tables one-third of his time or thereabouts, and that he held them out to the world by his language or his conduct, or by both, as his wives, you should find him guilty.

"It is not necessary that the evidence should show that the defendant and these women, or either of them, occupied the same bed, or slept in the same room, neither is it necessary that the evidence should show that within the time mentioned, he had sexual intercourse with either of them.

"I will state, the law presumes the defendant innocent until proven guilty, beyond a reasonable doubt; that you are the judges of the credibility of the witnesses, the weight of the evidence and of the fact, and if you find the defendant guilty you will say in your verdict, 'We, the jury, find the defendant guilty, in the manner and form as charged in the indictment;' and if you find him not guilty you will say: 'We, the jury, find the defendant not guilty.'"

The foregoing comprises the entire charge from beginning to end. The court should have informed the jury that this prosecution was

brought under the provisions of the "Edmunds' act," and they should have been informed when the act took effect. They should have been told that prior to the passage of that act, cohabitation was not an offense. The word "cohabit" should have been defined, and the jury instructed that unless they found, beyond a reasonable doubt, that the defendant had cohabited with the woman named in the indictment since the "Edmunds' act" took effect, and within the time named in the indictment, they should acquit. The defendant requested instructions on all these points and they were refused. This refusal was error, for it is the duty of the judge when requested, to instruct the jury upon every point of law pertinent to the issues: People v. Taylor, 36 Cal., 255; Hayes v. Paul, 51 Penn. St., 134. A party has the right to have the jury instructed upon the law of the case clearly and pointedly, so as to leave no reasonable ground for misapprehension or mistake and it is error to refuse to instruct when requested, upon points pertinent to the issue: Muldouney v. Ill. Cent. R. Co., 32 Iowa, 176; Carpenter v. State, 43 Ind., 371; Morris v. Platt, 32 Conn., 75; Nels v. State, 2 Tex., 280.

As far as the evidence goes the judge should give any pertinent instructions asked for conformable to the law: State v. Wilson, 2 Scan., 225; Davis v. State, 10 Ga., 101.

He need not adopt the language of counsel asking the instruction; but if the form and substance is not objectionable it is better so to do: Bish Crim. Pro., sec. 981.

Any explanation may be added, or of course any modification of its terms may be made: Lambeth v. State, 23 Miss., 322; Bish. Crim. Pro., sec. 981 and cases cited.

It is true that the court charged the jury that " the law presumes the defendant innnocent until proven guilty beyond a reasonable doubt," but the defendant was entitled to have them charged in the the language of his fifteenth and sixteenth instructions which were as follows:

"15. The law presumes innocence, and, therefore, that all persons who were cohabiting when the Edmunds law took effect, contrary to the provisions of that act, then ceased to do so."

"16. No fact in the conduct of the defendant, subsequent to the passage of the Edmunds' act, can be made, more significant of guilt in violating the section against cohabitation, by reason of the existence of the polygamous relation between him and the women mentioned in the indictment, prior to the passage of the statute." A general abstract statement that the law presumes innocence is not equivalent to specific instruction, that the law presumes innocence in a particular predicament shown by the evidence.

So, also, the last half of the thirteenth request should have been given. That instruction was, "that all the defendant's social familiarity with the mothers of such families, established prior to the passage of said act, not shown to include all the particulars of cohabitation, as the court has defined it, should be considered by the jury with the legal presumption of innocence, and the failure to establish such cohabitation would entitle the defendant to acquittal."

Evidence had been introduced of matters occurring prior to the passage of the law. The jury should, therefore, have been told that to find the defendant guilty, they must find that he had cohabited with the women named, within the time stated in the indictment. They were told that the defendant was charged with cohabiting with the women, between certain days, but they were not told that they must confine their investigation of his guilt or innocence to the proof of facts and circumstances occurring between those dates. On the contrary, they were at once informed, that if they found beyond a reasonable doubt, that the defendant lived in the same house with the women, ate at their tables, and held them out to the world as his wives, they should find him guilty. More restriction should have been placed upon the investigations of the jury, for no act done prior to the passage of the act, can be made by that act, the basis of a criminal charge. Nor can subsequent legislation make a prior act conduce to a conviction, for it would then alter the situation of the defendant to his disadvantage: Kring v. Missouri, 107 U. S., 221; U. S. v. Hall. 2 Wash., 366.

I have pointed out the foregoing errors, in order that they may be avoided in future trials of like nature. I think, however, that in the present case they are errors without prejudice, for, after most mature and conscientious reflection, I am not convinced that they affected the result. All of the testimony taken upon the trial is brought up with the record. After carefully considering it in all its bearings, I am persuaded that it clearly shows the defendant to be guilty as charged in the indictment. I am convinced that the verdict of the jury would not have been different than it was, even had the errors not existed. I, therefore, concur in the conclusion of the court affirming the judgment of the court below.

PEOPLE *v.* ROGERSON.

Department Two. Filed June 27, 1885.

REHEARING DENIED for the reasons stated in the opinion.

APPLICATION for a rehearing. The prior opinion is reported, 6 West Coast Rep., page 725.

W. H. Dickson, for the people.

P. Denny, for the respondent.

POWERS, J. This is an application for a rehearing, the reason alleged being that this court, in deciding the case, misapprehended the law. The case was carefully considered, in all its bearings, by this court on the hearing, and it appears, by the opinion on file, that all the points raised by the defendant were considered. We are not convinced that a rehearing should be granted, and a rehearing is, therefore, denied.

ZANE, C. J., and BOREMAN, J., concurred.

WEST COAST REPORTER.

WHOLE No. 82. JULY 23, 1885. VOL. VII. No. 2.

CIRCUIT COURT, DISTRICT OF OREGON.

GOLDSMITH *v.* GILLILAND ET ALS.

July 3, 1885.

SUIT TO QUIET TITLE—PARTIES.—Where a number of persons claim undivided interests in real property, adversely to one in possession of the same, the latter may maintain a suit to quiet his title against any or all of such claims, and neither of said persons, or adverse claimants, is a necessary party to a suit for that purpose against the other.

PLEA IN ABATEMENT FOR DEFECT OF PARTIES TO A BILL.—A plea to a bill for a defect of parties consists of new matter and is called a pure plea, and therefore, need not be supported by an answer; by it the defendant admits the case made by the bill, but objects that for want of parties the plaintiff cannot have the relief to which he may be otherwise entitled.

SUIT to determine adverse claim to real property. The opinion states the facts.

George H. Williams and *George H. Durham*, for the plaintiff.

Seneca Smith for himself and other defendants.

DEADY, J. This suit is brought by the plaintiff, a citizen of New York, to have his title to an undivided five-eighths of the east half of the Danforth Balch donation quieted, as against the claim of the defendants, citizens of Oregon, of an estate or interest therein adverse to him.

The case was before this court on demurrer to the bill on February 13: 22 Fed. Rep., 865; 5 West Coast Rep., 529; and to the amended bill on May 20: 23 Fed. Rep., 645; 6 West Coast Rep., 499.

It has now been heard on a plea in abatement to the amended bill for a defect of parties defendants.

Briefly, the plea sets forth, that the plaintiff and each of the defendants, and also Max Goldsmith, of New York, and W. B. Walker and Emma Dickinson, of Washington territory, own an undivided interest in the premises; and that such parties each "claim" to own a certain undivided interest therein, stating the portion claimed by each, and that the defendants and said Walker claim such interests under certain deeds made after the year 1870, by the four children of Danforth and Mary Jane Balch, to wit: John, Dan, Louis and Emma Balch, now Emma Dickinson, whose interest in the land, as appears from the amended bill, was sold at their guardian's sale prior to that time, to wit: September 24, 1870, under which sale the plaintiff claims, and said Emma Dickinson, *nee* Balch, as heir of

her parents; and concludes that said Max Goldsmith, W. B. Walker and Emma Dickinson, are not, but ought to be, "made parties to the said amended bill," and prays the judgment of the court, whether the defendants shall be compelled to make any other or further answer thereto.

On the argument, numerous objections were made to this plea. They may be conveniently condensed as follows:

1. The point made by the plea should have been made by demurrer. This objection is not well taken, because it does not appear from the bill who owns two of the three-eighths of the premises not claimed by the plaintiff, and, therefore, the point could not have been made by demurrer, that certain persons, for instance, Max Goldsmith, Walker and Dickinson, have or claim an interest therein, and should, therefore, be made parties to the bill. The bill only shows that five-eighths of the premises belong to the plaintiff, and one-eighth to Joseph Teal, but as they are eight-eighths in the whole, the necessary inference is that there are two other eighths owned by some other person or persons; but who they are does not appear, and for aught that does appear, they may belong to the defendants.

2. The plea is not supported by an answer.

This is a pure plea, consisting wholly of new matter. It admits the case made by the bill, but maintains that the plaintiff cannot have relief in this suit, on account of defect of parties in his bill. Such a plea never requires an answer in support of it: Story's E. P., sections 660, 670, 745; Equity Rule, 32.

In section 745, *supra*, Story says: "Although a plaintiff may be fully entitled to the relief he prays, and the defendant may have no claim to the protection of the court, which ought to prevent its interference; yet the defendant may object to the bill, if it is deficient to answer the purposes of complete justice. This is usually for want of proper parties; and if the defect is not apparent on the face of the bill, the defendant may plead the matter necessary to show it."

3. The plea does not negative the allegations of the bill.

But, being a pure plea—one which admits the allegations of the bill—it need not and ought not to negative them also.

4. The plea is double, and offers no issue.

A plea may consist of many particulars, but if they all conduce to a single point or conclusion, it is not open to the objection of duplicity.

This plea undertakes to show that Walker and Dickinson claim undivided interests in this property, under the same title that the defendants do, to wit: The title of the four minor children of Danforth and Mary Jane Balch, subsequent to and notwithstanding the alleged sale by their guardian, and, therefore, they ought to be made parties to the bill.

The suit is brought against the defendants because they claim an interest in the premises adverse to the plaintiff, and so far as Walker and Dickinson are concerned, the plea merely alleges that they also claim an interest therein, under the same title with the

defendants. All the matters in the plea tend to this conclusion or point, and if the plaintiff wants to put the same in issue, he can deny the allegation that these persons make any such claim, and if the issue is found in his favor, that disposes of it. However, it is not apparent on what ground Max Goldsmith is named in this plea, as there is no pretense that he is in the same boat with the defendants, or claims an interest in the premises adversely to the plaintiff. This was practically admitted by counsel for the defendants on the argument, and if necessary his name may be stricken from the plea.

5. Max Goldsmith, Walker and Dickinson, are not necessary parties, and being non-residents of the district cannot be made parties without depriving the court of jurisdiction.

Under section 8 of the judiciary act of 1875, 17 stat., 472, Max Goldsmith might be made a party to this suit by order of the court, although he is a citizen of New York; but, although said section is general in its terms, and provides that any person who is not found in the district where a suit is brought to remove a cloud upon the title of real property, may be served wherever he may be found by order of the court, yet, it must be construed as not including a person resident in a territory, because the jurisdiction of the United States courts, where the same depends on the citizenship of the parties, does not extend to a case between a citizen of a state and territory: Watson v. Brooks, 8 Saw., 220.

It follows that if Walker and Dickinson are indispensable parties, this plea must be allowed and the suit dismissed, for they cannot become parties without ousting the jurisdiction of the court.

The rule on the subject of parties to a suit in equity cannot be better stated than by Mr. Justice Bradley, in Williams v. Bankhead, 19 Wall., 571. He says: "The general rule as to parties in chancery is, that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First. When a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him, if he can be reached. Thirdly. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject matter, which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant." And see Barney v. Baltimore, 6 Wall., 284; Ribon v. Railway Companies, 16 Wall., 450; Mallow v. Hinde, 12 Wheat., 197, and Elmendorf v. Taylor, 10 Wheat., 167, to the same effect.

The act of February 28, 1839, section 737, R. S., which gives the United States courts the right to proceed in a cause and give judgment between the parties properly before it, in the absence of one or more defendants, not inhabitants of, or found within the district, has been construed in harmony with the rule as here laid down, so that even under this statute, the court will not, and cannot hear and decide a case in the absence of an indispensable party or one to be directly affected by its judgment: Barney v. Baltimore, 6 Wall,, 285.

Counsel for the defendants maintain that unless a complete determination of the controversy can be had without the presence of Walker and Dickinson, they must be brought in, and in support of this position he cites and relies on Pom. Rem., sections 369, 371, 418 and 419. But it must be remembered that the writer is speaking of the rule under the code, N. Y. code, section 122, Oregon code, section 40, which peremptorily provides that "when a complete determination of the controversy cannot be had without the presence of other parties than those before it, the court shall order them to be brought in."

Under this rule not only indispensable parties must be brought before the court, but also all those in the second and third of Mr. Justice Bradley's categories, in short, all those who have an interest in the controversy or the subject matter.

This rule, which, by the way, Pomeroy says, "is to a great extent a dead letter:" Pom. Rem., p. 422; might be enforced in the state tribunals, where absent parties may be brought before the court by the publication of a summons, but in the United States courts, where this practice does not prevail except in a few instances, its application would deprive them of their jurisdiction in a great many cases.

In Field v. Lownsdale, 1 Deady, 293, this court held that a suit brought to quiet title against a number of persons who claimed, as tenants in common, an interest in certain premises adversely to the plaintiff, that the interest of each one of the defendants was separate and distinct from the others, and therefore there could be a final determination of the controversy, so far as it concerned either of them, without the presence of the other defendants, as parties in the cause, and therefore that one of said defendants who had the requisite citizenship, might, as to herself, remove the cause from the state court under the act of July 27, 1866: 14 Stat., 306.

This case is exactly in point. Admitting that the defendants and Walker and Dickinson claim each an interest in this property adverse to the plaintiff, as set forth in the plea, they must claim as tenants in common, and, therefore, the claim of each is separable and distinct from the other, although it may arise in the same way and be established by the same proof. The case falls within the third of Mr. Justice Bradley's categories. Walker and Dickinson have an interest in the subject matter, and their claim being of the same nature as the defendants and growing out of the same circum-

stances, they might be joined in this suit, at the option of the plaintiff, as a matter of convenience to him; and even if it fell within the second category the plea would be insufficient under the circumstances, for Walker and Dickinson cannot be brought within the jurisdiction of the court.

This suit is merely the converse of the legal action to recover possession of real property. If the plaintiff was out of possession and the defendants and Walker and Dickinson were in possession claiming to own the land as tenants in common, even under the same title, the plaintiff could bring an action against either or all of them to recover the possession. And being in possession, and menaced by the adverse claims of these parties, he may maintain this suit to quiet his title against any or all of them, who are or may be brought within the jurisdiction of the court, as he may think convenient. And the fact that the determination of the controversy in this suit will not settle any controversy the plaintiff may have with Walker and Dickinson, touching any claim they may make to the property, is not a matter which concerns these defendants. It will not inconvenience or prejudice them, if the plaintiff chooses or is compelled to try this question over again in some other *forum* with those parties, with even a different result.

Each of the parties now before the court has an opportunity to allege and prove whatever interest he may have in the premises, and the judgment of the court will be a final determination, as between them, of the controversy. Nor is there any danger that by this means the several interests claimed by the various parties named in the plea, may become confounded and lose their identity, as suggested by counsel for the defendants.

The interests of tenants in common, though several and distinct in the abstract are possessed in common, and therefore as Blackstone says: 2 Book, 191; "they all occupy promiscuously," "because none knoweth his own severally." None of these parties can be said to own or claim any particular eighth or fraction thereof, of these premises, but simply an eighth or fraction thereof, which can only be located and identified by partition.

The plea is insufficient and is therefore overruled.

SUPREME COURT OF COLORADO.

McCOY v. WILSON.

Filed June 12, 1885.

JUDGMENT—APPEAL—EXECUTION SALE—TRESPASS—DAMAGES.—Under section 356 of the code of 1877, an appeal by one of two judgment debtors stays all proceedings on the judgment. If, however, pending such appeal, property of the judgment debtor be sold, under such judgment, and the execution sale be ratified by the debtor, the only damages he can recover in an action for the taking of such property, is the difference between its real value and the amount for which it was sold upon the execution.

APPEAL from the district court of Clear Creek county. The opinion states the facts.

Morrison & Fillins, and *Wells, Macon & McNeal*, for the appellant.

T. C. Rockwell, U. T. Hughes, and *M. J. Briggs*, for the appellee.

BECK, C. J. This appellant, McCoy, was judge of the county court of Clear Creek county, in 1878, and also acted as clerk of said court. In September of that year, in an action pending in his court, wherein one Hawthorne was plaintiff, and the appellee, Henry Wilson, and his brother, David R. Wilson, were defendants, a joint money judgment was entered against said defendants. David R. Wilson prayed and perfected an appeal to the supreme court, but the appellee, Henry, took no steps to reverse or avoid the judgment.

While the appeal was pending and undetermined, the said McCoy issued an execution upon the judgment against the property of Henry Wilson, and delivered it to the sheriff of said county to execute, who levied the same upon and sold the undivided half interest of said Henry in a planing machine and steam boiler. The entire property was owned jointly by the Wilson brothers, and used by them in their business. David R. Wilson procured one Thompson, to purchase the property at the sheriff's sale, loaning him a portion of the purchase money, and promising to take the property off his hands, and pay him interest on the investment until he did so. The property was never removed from the planing mill, nor does it appear that the business was in any manner interrupted by the proceedings now complained of. David R. Wilson procured a conveyance to himself from Thompson, and, according to his testimony, his brother Henry now pays him, as owner of the entire title, the sum of twenty-five dollars per month, as rent for the use of the half interest which Henry formerly owned. The money realized at the sheriff's sale, was applied upon the judgment, leaving only a small portion thereof unsatisfied. No further steps appear to have been taken in the appeal proceeding, and the validity of the Hawhtorne judgment would seem to have been conceded by the Wilson brothers, by their course in this affair.

In regard to the act of McCoy, there certainly was no authority of law for the issue of the execution, while the appeal was pending, and had they chosen to do so, both defendants might have treated the

proceedings, subsequent to judgment, as utterly void. The appeal by David, stayed all proceedings on the judgment, under sec. 356 of the code of 1877, then in force. The brothers, however, chose to adopt a wholly different course. David procured a conveyance from Thompson, and, thereupon, Henry acknowledged him to be owner of the full title, by paying him a monthly sum for the use of the half interest formerly owned by him.

Henry brought this suit to recover from the judge, McCoy, and the sheriff, Watts, damages for the taking and selling his property. He dismissed the action as to the sheriff, and recovered a judgment against McCoy for the full value of his interest in the property. This is the judgment we are asked to review.

The principal error relied on was giving to the jury the following instruction for the plaintiff, exception to which was duly reserved: "Whoever issued the execution is liable to Henry Wilson for the value of his property, with ten per cent interest from December 18, 1878, the date of the levy, to the present time; unless, from the evidence, you believe that Henry Wilson was the real purchaser at the sale. And if you believe that he was the real purchaser through Thompson at the sale, then and in that case Wilson is only entitled to recover the amount of the bid at the sale, which is shown to have been four hundred and twenty-five dollars, with interest as above stated."

We are of opinion the above instruction does not lay down the correct rule of damages upon either hypothesis covered by it.

So far as the Hawthorne judgment is concerned, it must be regarded in this case as a valid judgment. No proof was offered showing any reversal or modification of it. True, Henry Wilson interposed a replication to the answer of the sheriff, to the effect that he was never served with process, and neither appeared nor authorized any appearance for him, but offered no proof in support of such allegations, and, as we have seen, its validity was tacitly admitted after the issuing of the execution, by both of the Wilsons—one by having the property bid in for him, and the other, Henry, by ratifying the sale and receiving the benefit of its proceeds. He stands before us as acquiescing in all proceedings, regular and irregular, until the proceeds of the irregular sale were applied upon his indebtedness to Hawthorne, when he brought this suit for the value of his whole interest in the property sold, and recovered a judgment therefor, including interest thereon from time of the levy. He testified that the whole property was worth fifteen hundred dollars, and his judgment against McCoy was nine hundred dollars. This was more than he was legally entitled to under the circumstances.

While the issuing of the execution was a void act, and rendered McCoy liable in trespass, Henry Wilson having elected to ratify the execution sale, as he must be held to have done by his conduct, and having received the benefit of the money realized by the sale, he is only entitled to recover the difference between the real value

of his property and the amount for which it was sold upon the execution, no special damages having been proven. He cannot accept the benefits realized by the sale and recover a judgment also for the full value of the property sold. This is precisely the effect of the present judgment. The plaintiff made no effort to quash the execution, to restrain or set aside the sale, or to recover the property itself. Having apparently acquiesced throughout, his only loss, as shown by the record, is that accruing by reason of the property having been sold below its value. His own estimate of the value of his property was seven hundred and fifty dollars. It sold for four hundred and twenty-five dollars. The difference between these sums, with legal interest, would be the highest sum to which he would be entitled under the proof.

On the part of McCoy there was an effort to prove that Henry Wilson was the real purchaser at the sheriff's sale. The proof does not sustain this charge, but if it should be sustained upon another trial, the plaintiff would then only be entitled to recover nominal damages, together with such special damages as he might prove.

It is argued, on part of the appellee, that none of the testimony above stated, should be considered applicable to the case of McCoy, since he filed no plea of justification.

In answer to this, we have only to remark, that the trial below was a joint trial as to both defendants, McCoy and Watts, and no objection was made on the trial or exception taken concerning the point now raised; also, that after the testimony was in upon both sides, the suit was dismissed as to Watts, and the cause there submitted to the jury as to McCoy, upon the entire testimony. No motion was made to strike out or exclude any of the evidence, and no instruction was asked to disregard any testimony that had been introduced. It is presumed that objectionable testimony was assented to, if no objection was offered to it on the trial.

"It is a general rule that the supreme court will not review any questions except such as appear to have been raised in the court below; and this rule applies with peculiar propriety to questions of variance, which, if raised in the trial court, can generally be removed either by further proof or by amendment."

Parties are not entitled to object in an appellate court, for the first time, that a defense relied upon was not available: Wells' Questions of Law and Fact, sections 684-685, and authorities cited.

The judgment is reversed and cause remanded.

SUPREME COURT OF NEVADA.

EDGECOMB v. HIS CREDITORS.

Filed July 7, 1885.

APPEAL FROM SEVERAL ORDERS ON SAME SUBJECT.—An appeal from several orders made in insolvency proceeding, all relating to the same subject, will be considered as one appeal, requiring but one undertaking.

EXECUTION—EXEMPTION—LIVERY STABLE KEEPER.—The Nevada statutes provide that the following property shall be exempt from execution: "Two oxen, two horses or two mules, and their harness and one cart or wagon, by the use of which a cartman, huckster, peddler, teamster or other laborer habitually earns his living." *Held* that such exemption did not apply to a team used by a livery stable keeper, in the ordinary course of his business, although he was accustomed to drive such team himself.

APPEAL from the second judicial district court, Ormsby county. The opinion states the facts.

T. Coffin and *J. D. Torreyson*, for the appellants.

A. C. Ellis, for the respondent.

HAWLEY, J. The appeal in this case is taken "from an *ex parte* order made in said matter, on the eighth day of March, A. D., 1884, by the judge of said court, setting apart for the use and benefit of said insolvent and his family, as exempt from execution, two gray horses and their harness and one close carriage; and also * * * from two certain orders made * * * on the thirty-first day of May, A. D. 1884, finally exempting and setting apart said horses, harness and carriage for the benefit of said insolvent and his family, as exempt from execution; and denying said creditors' motion to vacate and set aside said *ex parte* order, and sustaining said insolvent's demurrer to said creditors' motion, and denying so much of said assignee's petition for authority to sell the property of said insolvent, as prayed for authority to sell said two gray horses and their harness and said close carriage."

Respondent moves to dismiss this appeal on the ground that it is taken from several different orders, and there is but one undertaking on appeal. This motion must be denied. It was not necessary to specify all the orders and rulings of the court declaring that the property in question was exempt from execution. An appeal from the order made on the thirty-first of May, finally exempting and setting apart said horses, harness and carriage, would have been sufficient to present the only question involved in this appeal. But the fact that all the rulings of the court upon this question were inserted in the notice of appeal, including some that were not appealable, does not change the character of the appeal. All the orders relate to the question whether the property specified is, or is not, exempt from execution, and they must be treated and considered as one order upon that subject, requiring but one undertaking on appeal.

The record shows "that said Ezekiel Edgecomb is, and for more than twenty years last past has been, a livery stable keeper, and for many years prior to the filing of his said petition was engaged in the business of keeping a livery stable in Carson Cit

during all of said time he kept numerous horses, carriages, buggies and other vehicles of his own, suitable for carrying passengers and pleasure seekers, for the purpose of hiring them or letting them to the public, and also cared for and stabled numerous horses for other persons; that during said time said Edgecomb has frequently and habitually used said close carriage and said horses and their harness, by using and driving them in person for the purpose of carrying persons about the city of Carson for the purpose of making social visits and calls, and for the purpose of carrying persons to and from funerals and weddings, and for the purpose of carrying persons to and from all kinds of social gatherings, theaters, concerts, and to and from the railroad depot with light baggage; and that he appropriated the proceeds of such labor and earnings by and with said horses and vehicle to the support of himself and family, and thereby habitually earned a part of his living for himself and family."

The statute under which respondent's claim of exemption is based, reads as follows: "The following property shall be exempt from execution: * * * Two oxen, two horses, or two mules, and their harness and one cart or wagon, by the use of which a cartman, huckster, peddler, teamster or other laborer habitually earns his living."

Is respondent an "other laborer" within the meaning of that term as used in the statute? The legislature evidently intended that the construction to be given to these words should be confined to other laborers *ejusdem generis* with those named. Language, however general in its form, when used in connection with a particular subject matter must be presumed to be used in subordination to that matter, and should be construed and limited accordingly.

It is not pretended that respondent comes within any class named in the statute. In order to be entitled to the benefits of the exemption law, he must, therefore, show that he was engaged in some business in which, by the use of his horses, harness and carriage he habitually earned his living. He has failed to do so. The record shows that his business was that of a livery stable keeper, which is plainly distinguishable from that in which cartmen, hucksters, peddlers or teamsters are engaged. If the legislature had intended to include livery stable keepers, that class would certainly have been named in the statute as they are as well known and of an equal or superior class to those named. It is evident that the words "other laborer" were not intended to include the business of livery stable keeper.

A livery stable keeper is not a teamster, or entitled to the exemptions of a teamster, simply because he drives his own team in carrying persons around town. Yet, "in common speech, a teamster is one who drives a team, but, in the sense of the statute, every one who drives a team is not, necessarily, a teamster, nor is he necessarily not a teamster, unless he drives a team continually. In the sense of the statute one is a teamster who is engaged, with his own team or teams, in the business of teaming—

that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family, if he has one. While he need not, perhaps, drive his team in person, yet he must be personally engaged in the business of teaming habitually, and for the purpose of making a living by that business. If a carpenter, or other mechanic, who occupies his time in labor at his trade, purchases a team, or teams, and also carries on the business of teaming by the employment of others, he does not thereby become a teamster in the sense of the statute. So of the miner, farmer, doctor and minister:" Brusie v. Griffith, 34 Cal., 306; or livery stable keeper.

In Dove v. Nunan, the plaintiffs were engaged in the business as coal dealers, and used a team, consisting of two horses and a wagon, by hauling coal and other commodities, for other people, for hire, and the proceeds therefrom were expended in their support; they also occasionally used the team in hauling coal and wood from their own coal yard to the place where they retailed the coal. Upon these facts, the court said: "The fact that the plaintiffs used the horses and wagon in question, as teamsters for hire, and that they expended the money thus received in the support of themselves and their families, did not exempt the property from execution. In order to entitle a party to claim, as exempt from execution, two horses * * * he must show that he is a cartman, * * * huckster, peddler, teamster, or other laborer, and that he habitually earns his living by the use of such horses:" 62 Cal., 400.

It is matter of common knowledge that the particular business upon which respondent relies, is incidental to, and connected with, the general business of livery stable keepers, and unless all livery stable keepers are entitled to have two horses and their harness and one wagon exempt, respondent is not entitled to such exemption. His business was that of a livery stable keeper, and nothing else. His character as a livery stable keeper was not changed by the fact that the team in question was only used for the particular purpose specified, or from the fact that respondent, in person, always drove the team. If respondent had been engaged in a business that entitled him to claim the exemption, the property would be exempt, although the horses and carriage had been occasionally let for hire to other parties, and would also be exempt, although respondent employed other persons to occasionally drive the team.

The rulings of the district court, exempting the property from execution, are hereby set aside, and the cause remanded to the district court for such further action as may be necessary in accordance with this opinion.

LEONARD, J., DISSENTING: I think the judgment of the court below should be affirmed.

As to the carriage, it is claimed, by counsel for appellants, that this court is bound to follow the case of Quigley v. Gorham, 5 Cal., 418, wherein it was decided that, in the statute of which ours is a copy,

"the term 'wagon' is intended to mean a common vehicle for the transportation of goods, wares and merchandise of all descriptions,'" and that, "a hackney coach, used for the conveyance of passengers, is a different article, and does not come within the equity or literal meaning of the act."

This court has frequently recognized and followed the well established rule, subject, however, to equally well established exceptions, that in adopting a statute from a sister state, the legislature is presumed to have intended to adopt it as construed by the highest court of that state. One of the exceptions to the rule stated, arises when the construction placed upon the statute in the sister state is inconsistent with the spirit and policy of our own laws: McCutcheon v. The People, 69 Ill., 605; Cole v. The People, 84 Ill., 218; Streeter v. The People, 69 Ill., 595; Rigg v. Wilton, 13 Ill., 15; Campbell v. Quinlin, 3 Scam., 288; Jackson v. Barton, 43 Iowa, 285.

It is the policy of our constitution and laws to allow debtors within reasonable limits, to retain those things that are necessary to enable them to enjoy the necessary comforts of life, and to carry on their usual employments: Elder v. Williams, 16 Nev., 423; Const. art. i., sec. 14; Comp. L., 1,282. It is within the spirit and policy of our constitution and laws, and according to the almost universal practice of courts, to construe exemption laws liberally. Whereever this rule or policy prevails, and it does not clearly appear whether certain property is or is not embraced within the exempting statute, the debtor will generally be allowed the benefit of the doubt, and suffered to retain the property:" Freeman on Ex., sec. 208.

In the case of Quigley v. Gorham, the strictest construction possible was adopted. The word "wagon" was declared to have been used by the legislature in its primary sense only. The constitution provides that, "the privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for payment of any debts or liabilities hereafter contracted." Of course it is the duty of the legislature to declare the kind and amount of property that shall be exempt, but when that has been done, it is the duty of courts to carry out the constitutional policy by including among the exempted articles anything which, by a liberal construction of the statute, may be embraced by the words, and which must be saved for the debtor's use, in order to accomplish the object of the legislature.

I have no doubt that the legislature intended to exempt two animals, with their harness or other equipments, and any suitable vehicle, by the use of which any person habitually earns his living, and to the exercise of whose business such animals, etc., are necessary. No good reason can be given why a carrier of passengers should not have the means of support as well as the carrier of goods, wares and merchandise. He is one of a class of persons whose living depends upon the use of a team, and that class the legislature intended to protect by the statutes under consideration. To say

that the carrier of passengers is not entitled to be protected, simply because the vehicle named is "a wagon," is following the letter rather than the spirit of the statute. It is considering the wording instead of the object of the statute. In view of the liberal construction everywhere given to exemption laws under constitutions and statutes like ours, the word "wagon" is sufficiently comprehensive to include all four wheeled vehicles used for the transportation of persons or things: Freeman on Ex., sec. 228; Allen v. Coates, 29 Minn., 48; Rogers v. Ferguson, 32 Tex., 533; Nichols v. Clairborne, 39 Tex., 363.

Many analogous cases may be cited, showing the spirit and policy of such statutes. In Arkansas, where the statute extended the exemption to "free white citizens," the word "citizen," as there used, was held to be equivalent to "resident" or "inhabitant:" McKenzie v. Murphy, 24 Ark., 155; and see Cobb v. Coleman, 14 Tex., 594.

Webster defines a "team" to be "two or *more* beasts harnessed together to the same vehicle for drawing," yet, under the term team, in exemption statutes, in numerous instances, a single animal has been held exempt. In those cases, the courts said the intention of the legislature was to protect the debtor in the use of his means of making a living, and the intent that would exempt a whole team, would also exempt half. They followed the spirit rather than the letter of the statute, and so many courts have made the word "team" include the vehicle drawn by it, and the term "horse" to include a saddle, bridle, stake-rope and martingale, although the latter articles were not mentioned in the statute, upon the principle that an exemption of a horse carried with it everything essential to its beneficial enjoyment.

In Mundell v. Hammond, 40 Vt., 641, two calves, nine months old, were saved to the debtor under a statute exempting "a yoke of oxen or steers."

In Malloy v. Berry, 16 Kan., 293, a wild, unbroken steer, twenty months old, was held exempt under a statute exempting "a yoke of oxen."

In Favers v. Glass, 22 Ala., 624, a cart was held to include a four wheeled wagon.

In Texas, under a statute exempting "two horses," a horse and mule are exempt: Allison v. Brookshire, 38 Tex., 200.

In Tennessee, a jackass is exempt under a statute exempting "a horse, mule or yoke of oxen:" Richardson v. Duncan, 2 Heisk., 220; and see Webb v. Brandon, 4 Heisk., 288; Freeman v. Carpenter, 10 Vt., 433; Wilcox v. Hawley, 31 N. Y., 655.

Believing that the decision in question is opposed to the spirit and policy of our constitution and laws, and that it does not express the intention of the legislature, I do not feel bound to follow it.

As I understand the decision of the court, the entire property in question is held not to be exempt, because it is, in fact, a part of the livery stable outfit, and respondent, being a livery stable keeper, is not one of the persons entitled to exemption, since he is not, in the

sense of the statute, either a "cartman, huckster, peddler, teamster or other laborer," although by the use of this property he habitually earned his living in part, just as he did with the other property in the stable. I do not think it was any part of the livery stable, and I do think respondent is a laborer, in the sense of the statute, who habitually earned his living by the use of this property. Respondent was a livery stable keeper, because he kept horses and vehicles for the purpose of letting them to the public for compensation, and he boarded horses for others. But the property in controversy was not so used. He neither let nor offered to let it to others. So far as this team is concerned, he was a private carrier of persons or passengers: Redfield on Carriers, etc., sec. 19; Schouler's Bailments, 590; Angell on the Law of Carriers, sec. 46.

This team was set apart for a use entirely different from that to which the others were put—as much so as it would have been if kept for the same purpose at another stable in a different part of the town. If respondent had had this team only, or a dozen others like it, and had used the one in question, or all, as he did this, no one could say he kept a livery stable. If he had kept in his stable a span of horses, simply and only to haul merchandise from the depot to stores, those horses would not have been part of his livery stable, any more than a yoke of oxen kept for the same purpose would have been. Livery stable keepers often do many things outside of that business, because it is convenient and profitable to do so. There is a livery stable kept in Carson, by men who also run a daily stage to Lake Tahoe. The stage horses are kept at the stable, but they are used exclusively in stage work, a business entirely foreign to livery business proper. Should a two-horse stage team be claimed as exempt under the statute quoted in the court's decision, it does not seem to me that it could be regarded as a part of the livery stable, or that the validity of a claim of exemption would depend upon whether livery stable keepers are entitled to an exemption.

There is a man in Carson who runs an express wagon. He carries trunks and packages to and from the depot, and elsewhere. He has two horses, their harness and a wagon, by the use of which he habitually earns his living. His team is now exempt. Suppose he should buy out a livery stable, carry on that business, and, besides, that of expressman, with the team he now uses, keeping the express team at the stable. Now, admitting, for the present, that, as a livery stable keeper, none of his livery teams would be exempt, why would he not be as much entitled to claim exemption for his express team as he was before purchasing the livery stable? Is he to be deprived of an expressman's exemption, simply because he is a livery stable keeper also, and because a livery stable keeper cannot claim an exemption?

It may be that the property in question would not have been exempt, unless a livery stable keeper may claim exemption, if respondent had used it in part as livery property, had let it for hire

to other parties, and partly as he did use it. But in view of the liberal construction that should be given to exemption statutes, in deciding whether respondent was a "cartman, huckster, peddler teamster or other laborer," I insist that the test should be the use to which he put *this property*.

Oftentimes a man is obliged, and he has always a right, to carry on different kinds of business. He may be a carpenter and joiner and a painter, a wagonmaker and blacksmith, a physician and dentist, a lawyer and minister. Whether persons so engaged in two different kinds of business can claim an exemption for each occupation or profession need not be discussed, because it is not shown that respondent claimed or had the benefit of any exemption, except the team in question and such other property as is accorded to all debtors regardless of their occupations. But the mere fact that a debtor carries on two or more kinds of business or professions, does not deprive him of all exemptions. Nor, under our statute, must the exempted articles belong to the business in which he is *principally* engaged, as is the case under the Michigan statute: Morrill v. Seymour, 3 Mich., 67.

In this state, I think, that when a person engages in different pursuits, either of which, if pursuing that vocation alone, would entitle him to an exemption, he may at least choose from which business the articles exemtped shall belong; and if he is engaged in two kinds of business, only one of which entitles him to favor, he may claim the exemption given under that one, the same as though he was engaged in no other. The fact that the use to which the property in dispute was put is "incidental to, and connected with, the general business of livery stable keepers," does not, as to this property make him a livery stable keeper. By our statute, a livery stable keeper is one "who keeps horses or carriages for rent or hire:" Comp. L., 3,186; Stat. 1861, 171, sec. 79. "Any person whose business it is to keep horses for hire, or to let, or to keep, feed, or to board horses for others, shall be regarded as a livery stable keeper:" 14 Stat. at Large, 116. With this property respondent habitually earned his living in part, not as a livery stable keeper, but as a private carrier of persons and passengers, and it is just as much entitled to exemption as it would have been if he had not run a livery stable with other property. If it is true, as the court decides, that a livery stable keeper is not entitled to an exemption, then that fact is an additional reason in favor of the view I take; because, otherwise, respondent will be deprived of all instrumentalities of productive labor, while other laborers who habitually earn their living by the use of horses, oxen or mules, and to the exercise of whose business such animals are necessary, may enjoy property that is just as necessary for his support as it is to theirs.

"The manifest requirement of the constitution is, that the exemption laws should be so framed that all classes of debtors should, as nearly as may be, participate equally in their benefits. We believe our exemption laws were framed and enacted in the spirit of

that requirement. Looking through these statutes we find no adequate provision in favor of merchants or shopkeepers as a class, unless it is contained in the statute under consideration. Their little stock in trade may be as indispensable to the support of their families as are the tools of the mechanic or miner, the press and type of the printer, or the library of the lawyer. Why should they not have the same protection as the others? And when we find language in a statute which may fairly be construed as giving them the same protection extended to other classes of debtors, why should not that construction be adopted?" Wicker v. Comstock, 52 Wis., 318.

My opinion is, that respondent as a carrier of passengers, is entitled to the exemption claimed, because, in the sense of the statute, he is a "laborer" who habitually earns his living by the use of the property in dispute, although he is also a livery stable keeper, and as such, is not entitled to an exemption. But, I think also, that if this property is part of the livery stable outfit, still respondent, as a livery stable keeper, is entitled to the benefit of the statute.

I agree with the court in saying that "in order to be entitled to the benefit of the exemption law, respondent must show that he was engaged in some business in which by the use of his horses, harness and carriage he habitually earned his living." It is not, and cannot be said, that a livery stable keeper does not fill this requirement. Of all occupations there is none in which a man must so signally fail if deprived of the use of his horses, harness and carriages, as that of a livery stable keeper. His entire business depends upon their use. Without them his occupation is gone. True, he does not drive his own teams, but that is admitted to be unnecessary. "The words 'used by the debtor, in obtaining the support of his family,' are general, and restricted to no particular mode of use. They are answered when the team is hired to others for a compensation, which compensation goes into the general fund to support the family, as well as where the debtor himself goes with the team as its driver, and adds the earnings of his labor to that of the team:" Washburn v. Goodheart, 88 Ill., 231; Elder v. Williams, 16 Nev., 420. But it is said that, in the sense of the statute, respondent is not embraced by the words "other laborer," because a livery stable keeper is not *ejusdem generis* with "cartman, huckster, peddler and teamster." The four words used in the statute are not themselves *ejusdem generis*, except in one sense. They have but one characteristic common to all, which is, that they specify persons in whose business a team is absolutely essential. To that extent only were they intended to be *ejusdem generis*. What other common feature is there between a cartman or teamster and a peddler? To the extent just stated, a livery stable keeper is *ejusdem generis* with those named.

In United States v. Lawrence, 13 Blatch., C. C. R., 212, the defendant was indited for forgery under a statute which provided a penalty for the forging of "any bid, proposal, or guarantee, official

bond, public record, affidavit *or other writing.*" The court said: "The first position taken in support of the demurrer is, that the rule of construction, according to which general words are restricted by particular words, should be applied to this statute, and the meaning of the words 'other writings,' in this provision, restricted so as to exclude from the operation of the statute such writings as are set forth in this indictment. The rule here invoked is not an arbitrary rule, but one of many resorted to for the ascertainment of the intent of the legislator, where such intent is not otherwise apparent. To apply it to all general words would often defeat the intention of the legislator, and such, in my opinion, would be the effect, if applied to this statute. Nothing in the language used, nor in the mischiefs intended to be remedied, nor in the circumstances under which the statute was enacted, indicates that the words, 'other writings,' were used in a restricted sense, but the contrary. Various writings are mentioned, but these writings have no common object, nor any characteristic features common to all, from which to infer an intention to restrict the effect of the provision to any particular class of writings. The language of the statute furnishes, therefore, no criterion by which to restrict its general words."

In Wicker v. Comstock, *supra*, the court construed a statute which exempted "the tools and implements, or stock in trade, of any mechanic, miner, *or other person*, used or kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value." It was claimed by the defendant that the term "or other person," should be interpreted to mean only a person *ejusdem generis*, that is, an artificer of some sort, and not a merchant merely. The court said: * * * "We conclude that the maxim *noscitur a sociis* is satisfied by restricting the operation of the statute to those debtors, who, although not artificers, must necessarily keep and use a stock in trade in carrying on their business, and who are not protected by other special provisions of the statute. This construction entitles the plaintiff to the exemption claimed." And see McAbe v. Thompson, 27 Minn., 135; Burgess v. Everett, 9 Ohio St., 426.

The court is of opinion that livery stable keepers would have been named in the statute if the legislative intent had been to include them. I do not think there was any effort or desire to name all or nearly all whom the statute was intended to favor. It would not be difficult to designate many, not mentioned, who come within the statute.

For the reasons above stated, I dissent from the decision of the court.

SUPREME COURT OF OREGON.

SULLIVAN *v.* OREGON RAILWAY AND NAVIGATION CO.

Filed June 11, 1885.

RES GESTAE—DECLARATION AFTER INJURY NOT ADMISSIBLE.—Under sections 672 and 676 of the civil code statements and declaration of a party who has received an injury, made after its occurrence, as to how it was occasioned, are not admissible as part of the *res gestæ*, in an action to recover for such injury.

NEGLIGENCE—EMPLOYER AND EMPLOYEE—EXEMPLARY DAMAGES.—Whether an employer, such as a railroad company, is liable in exemplary damages, for an injury caused by the malicious or willful misconduct of its employee, *quære?*

APPEAL from Wasco county. The opinion states the facts.

Rufus Mallory and *F. P. Mays*, for the appellant.

Gates & Wilson and *J. E. Atwater*, for the respondent.

THAYER, J. This appeal is from a judgment of the circuit court for the county of Wasco, rendered in favor of the respondent and against the appellant, in an action commenced in said court by the former against the latter, to recover damages in consequence of his having been put off of a train of cars alleged by him to have been owned and operated by the appellants.

The respondent alleged in his complaint in said action, that on the tenth day of October, 1883, he went aboard of said train of cars at Dalles City, a regular station on the line of appellant's road, for the purpose of being conveyed to Portland, and that the conductor thereof, after the cars had started and were in motion, ejected him therefrom, by reason of which he was thrown under the wheels of the cars and had his right foot so badly crushed that it had to be amputated. The language of the allegation of the complaint referred to is as follows: "That after the said train of cars had gone about one-fourth of a mile from said Dalles City, and while said train of cars was rapidly moving along its said railway, the defendant, by its agent and employee, who then had control, care and conduct of said train of cars for defendant, carelessly, negligently, and with force, ejected this plaintiff from its said train of cars, and caused him to fall from said cars to the ground while the same were so rapidly moving; and by reason of the said careless, negligent and wrongful acts of the defendant the plaintiff was thrown under the wheels of said cars, which cars then and there on account of the wrongful acts of the defendant, as aforesaid, ran upon and over the plaintiff, and crushed and wholly destroyed his right foot." The amount claimed, of general and special damages, was fifty thousand dollars. The appellant took issue respecting ownership and operations of said train of cars, the ejecting the respondent therefrom and the damages alleged by respondent to have been sustained. It also set up in its answer that the injury received was in consequence of his own carelessness and negligence.

The case was tried by the court and a jury duly empaneled. It appears from the bill of exceptions that the controversy at the trial

was mainly as to whether the conductor of the train pushed the respondent off the cars, or that he jumped off at his own instance. The respondent testified that the conductor pushed him off while the cars were in motion. The conductor, on the contrary, denied that he touched him, testified that he did not know when he got off the cars, that he went and pulled at the bell rope, and when he looked around the respondent was off. Another witness called by appellant, who seemed to have been a passenger on board the train, testified that he saw the whole affair and corroborated the testimony of the conductor, stated that the conductor did not touch respondent. He also testified that the respondent jumped off the train. The jury returned a verdict for the respondent and against the appellant for the sum of eleven thousand four hundred and fifty-nine dollars, upon which the judgment appealed from was entered.

The questions submitted upon the appeal involve the competency of some of the evidence given to the jury, and the correctness of a part of the instructions of the court to the jury, which we now proceed to notice. The bill of exceptions also shows that the respondent was a witness in his own behalf, that after he took the stand and was sworn, he stated that he went aboard the train of cars at Dallas City on the tenth day of October, 1882; the train was bound west; that it was in front of the Umatilla house where he went on to the train; that he went aboard of it for the purpose of going to Portland; that the train was on Oregon Railway and Navigation Company's train engine number eighty, marked O. R. & N. Co.; that it was a passenger train; that one Garfield was the conductor. He was asked by his counsel to state all that took place on board the train at and about the time he received the alleged injury. In answer to the questions he began by stating that he got on the train in front of the Umatilla house and had a conversation with the baggage master, which he began to relate, whereupon the appellant's counsel objected to it, but the court overruled the objection and allowed the respondent's counsel to ask the witness this question: "State what you said to the baggage master, and what he said to you?" To which ruling the appellant's counsel excepted; and the witness stated in answer to the question, that he got on the train just before it started; that he asked the baggage master how Garfield was to ride with, to which the latter answered "I guess he is all right; if he makes any 'kick' refer him to me." This evidence was clearly inadmissible, the conversation between the witness and the baggage master was wholly incompetent, but a majority of the members of the court are of the opinion that the evidence was without prejudice to the appellant, that it was really more calculated to prejudice the respondent's case than to benefit it.

The witness then proceeded to narrate the circumstances of the injury. He testified that soon after the train started, Garfield came out of the baggage car while he was standing on the platform at the forward end of the smoking car, a man named Clayton was with wit-

ness, there were two other men on the platform, the passengers went inside; while we were conversing, Garfield came out of the baggage car and I spoke to him for a ride to Portland as a favor from a railroad man; he said, "I don't know you and don't want to." Clayton handed him his pass while we were talking; Garfield said to me, "you will have to get off this train, you can't ride." Witness told him all right, stop his d— train and he would get off. Witness then stated that the conductor pulled the bell two or three times to stop the train, but it did not stop, that thereupon the conductor pushed him off the train, whereby he received the injuries complained of. After the witness had been examined he called Charles Pool as a witness, who testified, among other things, that he saw that the train passed west, and shortly after it had gone heard some one cry out, "oh say, oh say." Went to where the person was and found the respondent. The respondent's counsel then asked the witness this question: "What did respondent say?" The appellant's counsel objected to the question upon the grounds that the testimony was not competent. The court overruled the objection and the witness answered: "I asked him what was the matter? And he said the son of a bitch pushed me off, or throwed me off, I am not sure which, this was two or three minutes after the train passed, the train stopped just as it came through the cut out on the flat." The respondent then called two other witnesses to prove some facts, who were each asked some questions which were objected to by appellant's counsel upon the same grounds and the same ruling was made by the court and exception taken. One of the witnesses answered that respondent said upon the occasion referred to, "Garfield pushed me off," and the other "that he had been pushed off the train."

This testimony was calculated to influence the verdict of the jury, and if incompetent, the judgment entered thereon should be reversed. Such testimony has, in many instances, been admitted in evidence, and courts have attempted to give reasons for holding it competent. The line of authorities, in this country which maintain its admissibility seems to have commenced with the case of Commonwealth v. McPike, 3 Cush., 184. The courts that have followed the ruling in that case have frequently manifested a sort of a hesitancy as to its correctness, but have concluded that such statements were a part of the *res gestæ*, and been content to place their decisions upon that ground. That mode of disposing of important questions of proof in such cases is becoming quite unsatisfactory. Its tendency has been to overthrow one of the fixed principles of the law, that the best evidence which the nature of the case is susceptible shall be produced, and it leads to uncertainty and doubt. It is very easy to say that the statements and declarations of a party who has received an injury made after its occurence as to how it was occasioned are a part of the *res gestæ*, but extremely difficult to explain it and many times wholly impossible to point out any rule under which the determination has been arrived at. An act may sometimes

be explained, or its nature and quality be ascertained by an accompanying declaration which may be properly regarded as a part of the transaction in which it occurred, but it is never the act itself, nor the mere evidence of it. If a party were to be set upon and wounded, his narration of the circumstances attending the affair, or declarations as to who inflicted the injury, made after the transaction was ended and his assailant gone, would be no part of the occurence, it could only be his own account of the affair.

None of the class of cases referred to, furnish any certain test as to when such declarations may be given in evidence as a part of the *res gestæ*. It is said in some of them, that they must have been made at the time the act transpired, but in others, that a considerable time may elapse, and they still be such part, that each case must depend upon its own peculiar circumstances, and be determined by the exercise of a sound, judicial discretion. I do not fully understand what is meant by the latter expression. If it is intended by "a sound, judicial discretion" that the court before whom the trial is had, must judge as to whether the transaction was continuing when the declaration was made, or had ended prior thereto, then the question would not differ from other questions regarding the admissibility of testimony, the court would consider the facts and circumstances surrounding the affair, and determine therefrom as to its competency, but if, on the other hand, it is to be understood that the court is to decide the question in accordance with the judge's notions as to the justice of the particular case, then it is afloat without any chart to direct it. Precedents under that view would be of little value, as the peculiar circumstances attending each transaction would be likely to vary from those surrounding others of a like character, which had been adjudicated upon sufficiently to authorize a different holding. Such theory necessarily abrogates any law upon the subject; as law is a rule applicable to a class of cases which are alike in principle.

The question is too important to be left to such uncertainty, and there is no occasion for leaving it to be determined by vague speculation. The authorities upon the subject are quite numerous, and are widely different. The Massachusetts cases, with the exception of the one referred to, have generally held to a reasonable and consistent rule upon that branch of evidence, they have repudiated the notion that the admission of such declarations is left to the discretion of the presiding judge, and admit them only when they are calculated to explain the character and quality of the act, and are so connected with it as to derive credit from the act itself, and to constitute one transaction: Lund v. Tyngsborough, 9 Cush., 41. This appears to me to be as liberal a rule as any court can, consistently with the rules of evidence, sanction, and I think it very doubtful whether our courts, under certain provisions of our statute, would have any right to permit the introduction of declarations of parties as evidence, except under the condition of circumstances above referred to. Section 672, civil code, provides that a witness can be

heard only upon oath or affirmation, and he can testify of those facts only which he knows of his own knowledge, that is, which are derived from his own perceptions; except in those few express cases, in which his opinions or inferences, or the declarations of others, are admissible. And section 676, id., provides that where the declaration, act or omission, forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission, is evidence as part of the transaction. These provisions of the statute are declaratory of the law upon the subject, and are binding upon the court, they limit the right of a party in the introduction of that character of testimony to those cases where the declaration forms part of the transaction which is in dispute, and provides that it is evidence as part of it. This statute, undoubtedly, lays down the rule as broadly as many of the decisions of the court have done, especially some of the latter ones. See Waldele v. N. Y. C. & H. R. R. R., 95 N. Y., 274; and The People v. Ah Lee *et al.*, 60 Cal., 850. But many others have gone a most surprising length beyond it. Among them is that in Insurance Company v. Mosley, 8 Wall., 397. That decision, and all of a kindred nature, cannot, in my opinion, be maintained without doing violence to the law of evidence. It cannot be established by any system of logic that can be employed, that the statements and declarations of a party to a transaction, made after it has ended, are a part of it. It would be a moral impossibility.

Take the case under consideration as an example. The respondent went on to the appellant's train of cars at The Dalles, and desired to be carried to Portland without paying fare. The appellant's conductor refused to carry him upon such terms. After the train had started and had gone a short distance, the respondent is found off the train upon the ground in an injured condition, and he alleged as a cause of action against the appellant that the conductor pushed him off. The appellant, in its answer, denies that the conductor pushed him off, and avers that he jumped off. This is the principal issue in the case. The affair, whatever it was, occurred aboard the train of cars. Everything that transpired between the conductor and the respondent took place there, and ended fully and completely when the respondent left the cars, whether he was pushed off or jumped off. When the respondent went from the cars on to the ground, and the train had passed on, the transaction between him and the conductor was as effectually terminated as it was a month later. In a very few minutes after the train had passed the spot where the respondent struck the ground, three persons were attracted towards him, and naturally inquired how he came in that condition, and he answered as an enraged person would be likely to under the circumstances, as before stated, and which implicated the conductor in a reckless and grievous wrong to him. Had the respondent complained of pain and suffering, it would doubtless have been competent to have given that fact in evidence as proof of his injury, but to prove what he said the conductor did, in order to attach the blame

to the latter, and in his absence, is a distortion of the rule which permits the declaration of a party to be given in evidence. How can this statement be claimed to have been a part of the transaction between the respondent and the conductor, when the affair was at an end, and the latter party probably a mile away at the time? I am unable to endorse any such view. The statement of the respondent at the time referred to, as to how he came off the cars, is as undoubtedly hearsay evidence as any narration of the affair he has given since that time.

It occurs to me that courts of *nisi prius* would have but little difficulty in determining when the statements of a party in such cases were admissible as a part of the *res gestæ*, or were incompetent upon the grounds that they were only hearsay, if they would consider whether the transaction to which they related was continuing when they were made or terminated at the time, and make that the test of the matter; and I believe that much of the embarrassment they labor under in applying the rule in such cases has arisen in consequence of an attempt that has frequently been made to stretch the *res gestæ* doctrine to an unnatural extent in order to suit some supposed meritorious case, and which has led to the great diversity of decisions and confusion of the law upon that subject. The rule is very properly stated in Williams v. Bowdon, 31 Tenn., 282, in the following language: "The declarations are evidence because they are part of the thing *doing*. If, therefore, the thing shall have been *done* and *concluded*, declarations then made are not evidence." This is in consonance with the rule as declared in the provision of the Oregon statute before referred to, but the legislatures of some of the other states have, as I view it, authorized its extension. It is delared by statute in the state of Georgia that "declarations accompanying an act, or *so nearly connected* as to be *free from all suspicion* of *device* or *after-thought*, are admissible in *evidence* as part of *res gestæ*:" Code of the State of Georgia, 1873, sec. 3,773. Under a provision of that character, a declaration made after the transaction might be admissible, but the rule here is more restricted, and the declaration was improperly admitted. This disposes of the case, and it would be unnecessary to say anything more if it did not have to go back for a new trial, but as it has to take that course, it becomes our duty to pass upon other questions assigned as error.

The two instructions asked for by the appellant's counsel—viz.: "1st. The burden of proving that the train belonged to the defendant is on the plaintiff. This must be shown by proof, and if not proved, the defendant is entitled to a verdict, whether the plaintiff was put off the train or not. 2d. If the train belonged to the Northern Pacific Railroad Company, the mere fact that the conductor was paid by the O. R. & N. Co. would not be sufficient to charge the defendant with the consequences of this injury"—were properly denied by the court.

The ownership of the train was not important. The material question was, which of the two companies was using it at the time. If

it were being run by the appellant in its business, at the time the affair happened, the liability would attach to the company, if any such liability were created. The conductor may have been the servant of the appellant and employed in its business, although the train, that is, the property interest in it, have belonged to the Northern Pacific Railroad. The train may have belonged to the latter company, but not been under its control at the time. The second instruction asked for, which is above stated, may be true as an abstract proposition, but it had no sufficient relevancy to the case, the real question before the jury was, whose servant was the conductor when the affair took place. That he was paid wages by the appellant was some evidence that he was its servant at the time, and proof that the Northern Pacific Railroad Company owned the train, doubtless tended in a measure to show that it had the management and control of it when the occurrence happened, but the question was not of such a nature as to require the proof of it to be left to inference. The railroad was admitted to belong to the appellant, the conductor received his pay from appellant, and presumably, the train was at the time being used in the appellant's business. In order to rebut this presumption the appellant should have proved by direct testimony that the other company was using the road bed and running the train in its own business and for its own use. If the appellant's counsel had asked the court to instruct the jury that "if the train belonged to the Northern Pacific Railroad Company, and at the time of the occurrence of the affair, was in the use and employment of that company under a contract for the temporary use of the appellant's road bed, the mere fact that the conductor was paid by the appellant would not be sufficient to charge appellant with the consequences of the injury," he would have been entitled to have had it given, if there was any evidence before the jury tending to prove the fact, but in its present form it is too indefinite. Besides, the evidence did not justify the instruction, the payment of the conductor by the Oregon Railway and Navigation Company, was not under the evidence "the mere fact" showing that it had no further connection with the train, there was the other fact before the jury, which was conceded, to wit, that said last named company was the owner and proprietor of the road itself at the time the event happened.

The court,—after charging the jury that it was conceded in the case that just previous to the accident, the respondent was on board the train and attempting to ride to Portland thereon without paying fare, and that under those circumstances the agents of the company had a right to put him off if he refused to pay such fare, using reasonable care and caution in so doing, and that if in putting him off under such circumstances the respondent was injured without negligence or blame upon the part of the appellant, then it was not liable for such injury. But it was its duty to first stop the train and then put the respondent off, and if the appellant, through its agent, put the respondent off while the train was still in motion and thereby caused the injury, the appellant would be liable therefor, and that if the

jury found that the injury to the respondent was caused by the negligence or willful misconduct of the appellant, committed through its agent, and that the respondent did not contribute to it by his own negligence, they should find for the respondent and that the measure of damages should be: 1. For the expense of procuring the necessary medical attendance to an amount not exceeding one hundred and fifty dollars, the sum alleged. 2. For the necessary expense of securing care and nursing, to an amount not exceeding three hundred dollars. 3. For bodily suffering, impaired working capacity, mutilation and disfigurement necessarily resulting from the injury. 4. For such mental suffering, apprehension and anxiety as necessarily result from the injury,—proceeded to instruct them, as a fifth item of damages, that if they should find from the evidence that the injury was malicious and willful, or was caused by gross and wanton negligence, amounting to a total disregard of all social obligations, they would allow such sum as they would deem just and proper by way of punishment, and to deter others from such malicious and grossly and wantonly negligent acts in the future.

This last instruction was excepted to by the appellant's counsel, and it becomes our duty, as before indicated, to consider its correctness. It has, in many instances, been seriously questioned whether exemplary or punitive damages could properly be allowed in any private action. It would be extremely difficult, if not impossible, to give any good reason for such allowance, since the rule giving actual damages has been so liberally construed; but, however that may be, it seems to have attached itself to our jurisprudence, and we are made recipients of its benefits and compelled to endure the hardships it imposes. However, I am opposed to extending the rule to cases to which it was never intended to apply, and would work injustice if the application were enforced. When the conduct of a person has been willful, malicious and wanton, or reckless, and an injury has resulted to another in consequence of it, a jury might, with a semblance of reason, in an action to recover damages for such injury, assess something more than a mere compensatory sum therefor, that course, doubtless, would have a salutary effect in two respects—would visit the wrong doer with wholesome punishment and afford an example calculated to deter others from the commission of malevolent acts; but to attempt to extend the doctrine so as to visit the punishment upon innocent parties, is, to my mind, unreasonable and unjust. I cannot see any principle upon which an employer, whether a natural, or artificial person, can be made liable for the acts of his, or its, servant, beyond compensatory damages, unless the employer directed the doing of the act, or ratified it after it was done.

In the case at bar, the railroad company had been guilty of no wanton or reckless act in the premises, whatever its conductor may have done, then why should it be punished? It is made liable for damages by the acts of its conductor, by reason of the duty it owes to the public. It has impliedly stipulated to observe certain duties

and obligations, among them that it will transport passengers upon its train of cars safely, and with reasonable dispatch, and that it will insure them proper treatment while in transit; and its duty and obligation may be violated through the acts of its employees. The act of the conductor, whether it be negligent, malicious, or reckless, will effect such violation the same in the one case as in the other. Should the conductor wantonly and cruelly mistreat a passenger, the company is made liable, not strictly for the act of the conductor, but for the reason that the company has failed to perform the duty it undertook, and the obligation it tacitly agreed to observe. The acts of the conductor, in the present case, may have been so malicious and reckless as to indicate a depraved mind, and if such were the fact, he ought to be punished for his wickedness, but by what rule of consistency can that punishment be inflicted upon the company? It did not obligate itself that it would not engage the services of any one who would never display malice or exhibit recklessness, and it should not be made answerable for the sins of the conductor, except so far as they affected a branch of its contract before referred to.

It is claimed, however, in the decisions of the courts which hold that a railroad company is liable to exemplary or punitive damages, that the conductor of a train of cars is *pro hoc vice* to be regarded the company itself, but this certainly is only a fiction of law. The fact that the company acts through agents in the transaction of its business, is no more peculiar than where a natural person transacts his business through agents. The conductor usually has no pecuniary interest in the company beyond the stipend he receives for his services, he is not punished by the judgment against the company, whatever may be the amount of it. Corporations acquire their vitality by subscription for its capital stock. In this state one-half thereof must be subscribed before it is allowed to engage in the business proposed in its article, then the stockholders have a meeting and choose directors, who thereafter manage its affairs. The pecuniary interest, the real substance of the corporation, is represented by its stock; its entire assets belong to the owners of the stock, they may be in moderate circumstances, who have invested their surplus earnings in the purchase of the stock, relying upon dividends to be realized therefrom. It is the stockholders who are affected injuriously by a judgment against the corporation, and who are punished when exemplary damages are awarded in the action, and, if there is any justice in a rule which allows it in such a case, I am apprehensive that I shall never be able to discover it. Different views are entertained upon the question by courts in the different states, and while those of quite a number of them have held that such damages were allowable against a corporation for the acts of its agents, yet those of a very respectable number of the other of the states have maintained to the contrary. I think the rule upon the subject, laid down in Cleghorn v. N. Y. C. & H. R. R. Co., 56 N. Y., 44, the correct one, which makes the master liable for such damages when he is chargeable with gross neglect in the employment or

retention in his services of an incompetent servant, knowing at the time of his insuitability, or that he authorized or ratified the act of the servant in the particular case.

The question as to whether the complaint is sufficient to permit the recovery of that character of damages in the case, need not, under the view taken of the last point, be decided. It will not be amiss, however, to suggest, that in order to recover exemplary damages in any case, it must appear from the complaint, either by direct averment or from necessary inference, that the act occasioning the damages was done maliciously, or was the result of the willful misconduct of the defendant, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them.

The judgment appealed from is reversed, and the case remanded to the court below for a new trial.

LORD, J., concurs, except as to the last point discussed.

WALDO, C. J., dissented.

CITY OF CORVALLIS v. STOCK.

Filed June 11, 1885.

APPEAL FROM RECORDER'S COURT—CITY OF CORVALLIS.—An appeal lies from the recorder's court of the city of Corvallis, in adjudications upon city ordinances. The decision in Sellers v. Corvallis, 5 Or., 273, followed, but not approved.

APPEAL from Benton county. The opinion states the facts.

J. W. Rayburn, for the appellant.

John Burnett, and *J. P. Bryson*, for the respondent.

THAYER, J. This appeal involves the question of the right of appeal from the recorder's court. It was held by the court, in the case of the Town of Lafayette v. Clark, 9 Or., 225, that an appeal would not lie from the recorder of a city, in adjudications upon city ordinances, unless given by statute. The question here is, whether the charter of the city of Corvallis gives such right of appeal. Upon an examination of said charter we have discovered that there is, in our opinion, no material difference between its phraseology and that employed in the Lafayette charter upon that subject. And we should be inclined to hold that it did not provide for such appeal, were it not for the decision of this court in Sellers v. The City of Corvallis, 5 Or., 273. That decision was rendered by judges occupying the same position as we do; and while we do not endorse it, nor regard the reasons upon which it was predicated as satisfactory, yet we do not feel at liberty to depart from it in this particular case. If it were a case of continued injustice or of a clear violation of obvious principles of law, we ought not to hesitate a moment in pronouncing it not law; but, under the circumstances, we think we should be controlled by the doctrine of *stare decisis*. Whichever way we might

determine the matter would be of no public importance; and as we find that the identical question has been adjudicated upon and acquiesced in for a number of years, we have concluded that we should not attempt to disturb it. For these reasons, we are of the opinion that the judgment appealed from should be affirmed.

SUPREME COURT OF UTAH.

UNITED STATES *v.* MUSSER.

Filed June 27, 1885.

UNLAWFUL COHABITATION—SEXUAL INTERCOURSE UNNECESSARY TO CONSTITUTE OFFENSE.—In order to constitute the offense of unlawful cohabitation, within the meaning of section 3 of the act of March 22, 1882, sexual intercourse is not essential.

THE SAME—EVIDENCE OF OFFENSE.—On a trial for such offense, alleged to have been committed between certain dates, evidence of the defendant's relations and conduct with the women named in the indictment, prior to the first named date, as well as prior to date of such act, is admissible.

OBSERVATIONS MADE BY THE ATTORNEY FOR THE PEOPLE IN HIS ARGUMENT to the jury, as to facts not in evidence, will not warrant a reversal of a verdict of conviction, if the court, at the time, reproved the attorney for his conduct, and afterwards instructed the jury to disregard all facts not in evidence.

THE REFUSAL TO GIVE INSTRUCTIONS REQUESTED will not warrant a reversal, if the same have been given in substance, or if the instructions given cover the entire case.

THE EVIDENCE REVIEWED at length, and held to warrant a verdict of conviction.

APPEAL from the district court. The opinion states the facts.

Arthur Brown, Sutherland & McBride, Bennett, Harkness & Kirkpatrick and *F. S. Richards*, for the appellant.

Dickson & Varian, for the respondent.

ZANE, C. J. The defendant was indicted for unlawful cohabitation with Belinda Pratt Musser, May Musser and Annie Segmiller McCullough Musser, to which indictment he pleaded not guilty. The issue was tried by a jury who found him guilty as charged; a motion for a new trial was overruled and he appealed to this court. On the trial the defendant by his counsel alleged errors of law and of fact. The more important of the former was made by the court, it is claimed, in defining the crime of which the defendant was convicted.

The offense is described in the third section of "An act to amend section fifty-three hundred and fifty-two of the revised statutes of the United States, in reference to bigamy and for other purposes," approved March 22, 1882. It is as follows: "If any male person in a territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor." The court below held that sexual intercourse was not essential to the crime. In

that the defendant insists there was error, that it is a necessary element and must be proven.

The term cohabit as found in the criminal codes of many of the states is coupled with and qualified by the adverbs lewdly, lasciviously, adulterously or some other equivalent expression. No such word or expression is found in the section under consideration, or in the act of which it is a part. As defined by lexicographers, cohabit means to dwell with or reside together. It may mean residing in the same country, city or neighborhood, or in the same family, or the dwelling together in lawful wedlock—this would be lawful cohabitation. Or it may mean the dwelling of a man and woman together ostensibly and apparently in wedlock, when in fact or in law no marriage exists, and without proof of adultery or fornication this would be be unlawful cohabitation; or it may mean the living together of a man and woman without lawful marriage, in the practice of fornication or adultery—this would be lascivious, lewd or adulterous cohabitation, another species of unlawful cohabitation; in this last case proof of adultery or fornication is necessary to make out the offense. The ideas which accompany the use of the word determine its import. The ideas of country, of family, of marriage, of the appearance of marriage without it, or of adultery, when associated with the term vary and determine its meaning in each case. The subject to which it is applied contracts or expands its meaning—it is a word of flexible signification.

Cohabitation, as used in a matrimonial sense, means to dwell together as husband and wife. Foster v. Foster, 4 Eng. Ec. R., 359, was a case of divorce. In the opinion the court used the following language: "Most certainly, what Dr. Harris has said is true, that the duty of matrimonial intercourse cannot be compelled by this court, though matrimonial cohabitation may." The court made a very plain distinction between matrimonial cohabitation and matrimonial intercourse. The same distinction was made in the case of Nash v. Nash, id., and in Orm v. Orm, 2 Eng. Ec. R., 354. In a note to section 777, Bishop on Marriage and Divorce, the author says: "I am not aware that other judges (referring to a remark of chancellor Walworth) have often employed this word to denote actual sexual intercourse further than may be presumed from the dwelling together in the same house of parties under the claim of being married, or as necessarily implying even an occupancy by the husband and wife of the same bed. The words matrimonial cohabitation have been used in distinction from matrimonial intercourse to signify a living together in the same house without copulation." To the same effect is the case of Calef v. Calef, 54 Maine, 365, and Yardley's Estate, 75 Pa. St., 207. Ohio v. Connoway, Ohio R. Tappan, 90, was a criminal prosecution. In charging the jury the court read the statute defining the crime which was, "If any married man shall hereafter desert his wife, and live and cohabit with any other woman in a state of adultery, etc.," and remarked, "The defendant must not only have lived and cohabited with this

female, but he must have lived and cohabited with her in a state of adultery." In this the court indicated clearly that it did not understand the word cohabit to embrace sexual intercourse when not qualified by some expression showing such an intention. Counsel, in their briefs and arguments, made reference to numerous other cases, but it is found that the most of them interpreted or construed statutes containing qualifying terms.

We are of the opinion that the weight of authority is to the effect that the crime of unlawful cohabitation, as defined in the statute under consideration, is made out without proof of sexual intercourse, and that such proof constitutes no defense. In the statute but two crimes are defined. The first section defines polygamy; the third unlawful cohabitation; the fourth provides that the offenses may be joined in the same indictment; the fifth makes the fact that a man summoned as a juror is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation, with more than one woman, or the fact that he is, or has been, guilty of either offense, or the fact that he believes that either of such offenses is right, a ground of challenge. And the eighth section disqualifies those persons, who are living in the practice of polygamy or unlawful cohabitation, from voting or holding office. Cohabitation with more than one woman is essential to the crime. If the law was aimed at adultery, why require the cohabitation to be with more than one woman? If the national legislature had so intended, it would have given some intimation of that intent in the law. It appears plain that the intention was to protect the monogamous marriage by prohibiting all other marriage, either in form or in appearance only, whether evidenced by a ceremony or by conduct and circumstances alone.

The court should ascertain the intention of the legislature from the words used, when plainly expressed. But when the meaning of the words is obscure and doubtful and the intention of the lawmaker is uncertain, it becomes the duty of the court to resort to rules of construction in order to discern the idea, which the language was intended to express. In the use of the rules of construction, we are not confined to the uncertain language of the law, but we may take into view the ideas which the legislator associated with the idea that is in dispute. For with them it existed in the legislator's mind, and in the light of those ideas we may grasp the meaning of the law, as the legislator endeavored to express it.

We may assume that the authors of this law had in mind the institution of marriage because they expressly declared that any man who having a wife marries another, is guilty of a crime, and that any male person who cohabits with more than one woman is guilty of unlawful cohabitation. They had in view the evil effects of such practices. The end of the law was the protection of the monogamous marriage; and the suppression of polygamy and unlawful cohabitation were but means to that end. It is proper also, to take into consideration the conditions as the national legislature anticipated and understood them in which the law was to be applied

and enforced. They knew the time had elapsed within which a very large portion of those living in polygamy could be punished for that offense, and that many of these were among the most influential men in society, being the heads of the church, and that the example of their continuing to live with their plural wives under a claim of divine right, would be a scandal to society and a menace to the lawful marriage; that such examples would be a continuing invitation and apparent justification for their followers to either secretly or openly violate the law. Congress, therefore, forbad plural marriage in appearance only, as well as in form, and by the example of punishment it doubtless intended to eradicate the example of apparent plural marriages as well as the plural marriage in form.

According to the maxims of sound interpretation for use in searching for the intention of the legislature, it is proper to ask, what was the defect and mischief against which the law did not provide, and the true reason of the remedy? And it is the duty of the court at all times, to make such construction as shall suppress the mischief and advance the remedy: Potter's Dwarris on Statutes and Constructions, 184. Whether we interpret the terms used according to their legal sense or resort to the rules of construction and construe them in the light of the reason and the purpose of the law and of the condititions in which its authors understood it was to be applied to human conduct, we reach the same conclusion.

The defendant also insists that the evidence before the jury did not prove him guilty. This raises a question of fact; to determine which it is necessary to examine the evidence. Annie M. Sheets, a daughter of defendant by a deceased wife, married and not living at home, testified that she had known the women named in the indictment, Mary Musser, Annie Segmiller McCullough Musser and Belinda Pratt Musser, several years; that Belinda and Mary lived in defendant's house; that the former lived there about one year and a half and moved to the house she now lives in about four months ago; that Annie Segmiller Musser lived in a house on an adjoining lot; that they all there have children who bear the name of Musser living with them; that Belinda has three; two of them bear the name of Musser; that she never heard the younger called any name but Arthur; that there were eight children in the house, one of them, Blanche Musser, is between two and three; that Annie Segmiller McCullough Musser has three children from five to eight who go by the name of Musser; that defendant called them by their given names and they addressed him as father; that the defendant, her father, lived in the same house with Belinda and Mary, witness did not live there herself but visited, had seen him at the table with Mary in the house in which Belinda and Mary lived; that the house had eight rooms on the ground floor and four on second, the rooms down stairs connected by doors, Belinda's bed room was on the west side, Mary's on the east, defendant's between, from his a door opened into Belinda's, between Mary's and his was another

room having doors which opened into theirs; that the older children slept upstairs and the younger ones down; had heard defendant refer to Mary as witness's step-mother and heard Mary's children address him as father; that she did not know where Arthur is, last saw him four or five months ago at his mother's house, nor does she know where Mary is; the women named in the indictment have been for several years past recognized and known in the Musser family as defendant's wives.

Lizzie Lee testified that she was a married daughter of Annie Segmiller, now known as Annie Segmiller Musser; that Belinda Pratt Musser and Mary Musser lived in a house on a lot adjoining her mother; that she knew defendant; that her mother has five children; did not know how old Ross, the younger, is, last saw him between four and five weeks ago; when attention was called to her statement before the grand jury, she said between two and three years old, that he was not an infant in arms when she last saw him; that she saw defendant at her mother's house about a week ago, her mother was not there, has not seen her for four or five weeks; last saw the child in her arms; that she had seen defendant at her mother's four or five weeks ago; that her mother is recognized by her and her mother's families as defendant's wife; and heard them speak of the children in presence of each other, though not as his; that her mother's children were named Musser. Witness has one full brother and one sister; their name is McCullough; had heard her mother's other children speak to defendant and of him as father; that her mother's maiden name was Segmiller; she married McCullough and she now goes by the name of Musser; had seen defendant at her mother's a number of times, in the evening and morning; witness lived beside her mother, and since last August, at her house.

Mary Rideout testified that she had seen Mary Musser's children; that the youngest she saw was two or three years old; had not visited her for three years; that she had seen Belinda Musser's child; when she saw it, it appeared to be something over a year old; was an infant nursing; it was a nursing infant in arms last winter, three or four months ago; that witness had seen defendant quite lately about the house; that she travelled with Annie Musser, and defendant met her at the carriage, she had her baby with her; this was last summer.

Joseph Warburton testified: Knew Belinda and Mary Musser and the house in which they lived; was at the house; saw defendant there and going to and coming from the house, driving into the barn; that children bought articles at store and defendant paid for them; that most of the children were Mary Musser's; saw defendant walking and choring around his premises.

M. F. Ekels testified that prior to the sixteenth of last October, lived at Mary Musser's about a year and four months, boarding there; that defendant was there at meals, he sat at one end of the table there nearly all the time; that he ate at Belinda's table once,

the occasion was a birthday party, defendant was there; that Mary Musser had six children, the youngest is an infant running around, whether it was a year ago do not remember, its name is Blanche; that he knows Annie Segmiller McCullough Musser; witness is a school teacher; went to see her about children she was sending to school; one of Belinda's also went, and some of Annie's, all went on the roll by the name of Musser; that Mary Musser paid tuition for all the children who came under the name of Musser.

Defendant offered in evidence three deeds which had been recorded in which he was grantor, bearing date July 21, 1883, Mary Musser was grantee in the first, Belinda Pratt Musser in the second, and Annie Segmiller Musser in the third; that Belinda Musser moved to the house she now lives in last December.

From the foregoing evidence it appears that the women named in the indictment have for years borne his name and before that they had borne other names; that for more than one year next preceding December last, defendant had lived in the house with Mary Musser and Belinda Musser; that these two women and defendant occupied bed-rooms on the same floor; that a door opened out of defendant's room on the east, directly into Belinda's room, and on the west into a room which opened into Mary's; that he ate a large portion of the time at her table; that the third woman lived in a house on an adjoining lot; that defendant was frequently there; that Mary has six children, the youngest two or three years old, and Belinda three, the youngest two or three years old; that Annie has three children, ages between five and eight years; that these children all bear the name of Musser and have addressed him as father, and that all three of the women are known and reputed in the family to be defendant's wives. It is undeniable in view of the evidence that defendant lived a large portion of the time charged in the indictment, in the same house with two of the women, and all the time in a house adjoining the other woman at whose house he was frequently. What relationship did he bear to these women with whom he was living? Was it the relationship of father and daughter, brother and sister, employer and employee, master and servant? Neither of these questions can be answered in the affirmative in the light of the evidence. The evidence points to but one relationship, and that is matrimonial, husband and wife; the evidence can be reconciled on no other hypothesis. To consider a portion of the evidence apart from the rest is not the right way to determine its sufficiency, a portion may not establish the disputed fact, but all together may prove it beyond a reasonable doubt. A portion of a physical structure does not prove its existence, but when all the parts are taken together, there can be no room to doubt its existence. When all the evidence in this case is so considered, we are of the opinion that it sufficiently appears that defendant, during the time mentioned in the indictment, was living with at least two of the women named, in the apparent relation of marriage; that by his language and conduct and appearances and expressions for which he was responsible, he

held out to the world that relationship; that he was living with them in the habit and repute of marriage. We are of the opinion that the evidence was sufficient to authorize the verdict formed.

Witness Lizzie Lee, who lived at the house of one of the reputed wives and her daughter, stated that she did not know where her mother was, that she last saw her four or five weeks ago. And witness Annie M. Sheets, a daughter of the defendant who visited the house of Mary Musser and defendant frequently, testified that she did not know where Mary was. And the evidence tended to show that two or three of the youngest children had not been seen for some time. And the assistant district attorney in his closing argument to the jury, said that it was in the power of defendant to show all the facts in defense by his wives and children, but that it was not in the power of the prosecution to do so by them, because they had been put out of the way by the procurement of the defendant. The defendant's counsel objected to this language, and the court said there was no evidence that defendant had put them out of the way, and the assistant district attorney made no further remarks on the point. The bill of exceptions also shows that the same attorney in his argument, stated that an outsider had made signals to the jury during the trial, and the court checked him, and he said nothing further with respect to it. The remarks were made in the heat of argument, and the attorney did not persist, but ceased as soon as his attention was called to the impropriety. The court charged the jury that in considering the verdict, they should not go outside of the evidence and take into consideration facts not in evidence, that they should consider only evidence, and consider it fairly. In support of this assignment of error, counsel for defendant cite a number of authorities. In some of them the trial court had permitted the prosecuting attorney to continue over the objection of defendant. In other cases the remarks of the state's attorney was in violation of a statute forbidding comment on the fact that defendant had not testified when the law permitted him to do so. In each of the cases cited there had been an aggravated breach of professional duty and obligation to the injury of the defendant. In view of the circumstances attending the statements of the assistant district attorney, and of the fact that he ceased further remarks as soon as his attention was called to the impropriety, and of the charge of the court, and of the authorities, we are of the opinion that this exception is not well taken.

The indictment charges that the defendant unlawfully cohabited with the women therein named, between the first day of May, 1882, and the first day of April, 1885. And the defendant insists that it was error to admit evidence of defendant's conduct and of his relationship to them before the day first mentioned. The offense of the defendant consisted in dwelling with the women in the habit and repute of marriage, holding that relationship out to the world by his language and conduct or by expressions and conduct for which he was responsible. That he lived in the house with two of them during

the time mentioned, there is no room for controversy. And the question is, What relationship existed between the defendant and these women? Was defendant there as a guest? As a boarder? Was he the proprietor of the house and the women in his employ as servants—chambermaids or cooks? Were they his sisters? Was any of them his mother? Or were they there as his wives? Does not his conduct before the offense charged throw light upon the inquiry? Evidence of the feelings and intent of the defendant with respect to the crime and towards the injured party is competent in cases of murder and other crimes which may be committed by a single act. It would appear to be more pertinent when the offense consists of a succession of acts and expressions extending through a considerable period and indicating the relationship of marriage. That relation is usually preceded and attended by affections and feelings peculiar to it, and more permanent in their character, and they give rise to conduct indicating their existence, and thereby indicating marriage. Evidence that defendant had married the women—had been living with them as his wives before the offense—adds weight to the circumstances pointing to unlawful cohabitation during the time the offense is charged.

It is further insisted that the court erred in admitting evidence tending to show marriage to the women named before the law which the defendant is charged with violating took effect, and that the court erred in refusing to charge the jury that the law presumed the defendant ceased to cohabit with his wives when the law took effect. The court did charge that the law presumed the defendant innocent till proved guilty beyond reasonable doubt—innocent both before and after the law was in force—before and at the time of the offense charged.

If a lawful relationship is formed, and its continuance is made unlawful, the law presumes the parties thereto intend to obey the law, and that they terminate or change the relationship so as to make it conform to an innocent intent. In such a case it is necessary that the lawful intent should be changed to an unlawful one, or that the relation should be changed to a lawful one, that is to say, made to conform to the law—the law presumes change of conduct rather than change of a lawful intent to an unlawful one. But if the relationship was unlawful in its inception, and the intention was unlawful, then it would be necessary to presume a change of both intention and relationship. If the relationship was unlawful in the beginning, and the intent was also, and the name of the offense is simply changed, or punishment is simply imposed on that which was unlawful before, the presumption remains the same as though no change had been made in the law. In either case the law presumes innocence till guilt is proven. A disposition and intention to violate the law in entering into the relationship with these women being shown, it affords an inference of some effect upon the man when considered with the other evidence at the time of the offense charged. The inference against the defendant from his

marriage to these women before the law went into force with the inferences from his own conduct towards them, and the circumstances within the time limited in the indictment strengthens the latter. In determining how this man lived between the dates named, the public would take into view his inclination and disposition to cohabit with the women as shown by his conduct and example before the law took effect, and in that way contributes to the example which injures society. The common law has been in force in this territory more than a generation. And an act of congress against bigamy more than twenty-two years. None of the conduct or circumstances in evidence extend back so far. They tended to prove a relationship unlawful in its inception. We are of the opinion that there was no error in admitting evidence for the purpose of showing marriage between the defendant and the women named, before the law took effect, or showing that he cohabited with them as his wives before that time: Thayer v. Thayer, 101 Mass., 111.

Exceptions were also taken to the charge of the court to the jury, and to the refusal of requests to charge by the defendant. The entire charge of the court, as given to the jury, is set out in the bill of exceptions. It contains a description of the offense and the plea of the defendant, and charges them that the law presumes the defendant innocent till proven guilty beyond a reasonable doubt; that if the jury believe beyond a reasonable doubt that at the county and between the dates mentioned in the indictment, the defendant lived with the women therein named, or with any two of them as his wives in the habit and repute of marriage, they should find him guilty; that it was not essential that sexual intercourse should be shown or a marriage celebrated; that the jury were the sole judges of the credibility of the witnesses, of the weight of the evidence of the fact; that in judging of their credibility the jury might take into consideration the deportment of the witnesses on the stand, their apparent frankness and candor, or the want thereof, appearing from the evidence—the reasonableness of their statements, and any fact appearing in evidence affecting their credibility; that in weighing the evidence the jury should consider it altogether, and should consider only evidence, that they should not go outside of it; that they should consider it fairly and candidly, and reach such reasonable conclusions as they might be able. The jury found the defendant guilty as charged.

The prosecution asked no instructions and the defendant asked twenty-five—all of which were refused except so far as their principles were contained in the charge given.

In the case of the Indianapolis, etc., R. R. Co. v. Horst, 93 U. S., 291, the court said: "It is the settled law in this court that if the charge given by the court below covers the entire case and submits it properly to the jury, such court may refuse to instruct further. It may use its own language, and present the case in its own way." The charge of the trial court in this case covers the entire case and is plain. In the case last cited the court also said: "When instruc-

tions are asked in the aggregate, as were those of the defendant, and there is anything exceptionable in either of them, the whole may be properly registered by the court. That there were many things exceptionable in the twenty-five asked in the case under consideration is certain. The instructions asked and refused, so far as we deem it necessary to refer to them, may be classified as follows: First—Those stating abstract principles of law. In the refusal of these there can be no error. Second—Such as attempted to define the degree of intimacy necessary to be shown between defendant and the women named. In its charge to the jury the court gave a definition of unlawful cohabitation, and in doing so defined the necessary intimacy. Third—Those relating to the presumption of innocence arising when the law under which defendant was prosecuted took effect. The question raised by the exception was discussed above, and we are of the opinion that the exception is not well taken. Fourth—Those declaring principles of law included in the charge. The court stated such principles in its own language in the charge, and that was sufficient.

The precise questions raised by the exceptions to the ruling of the court below in this case in refusing to sustain objections to the indictment were considered in the case of the United States v. Cannon, *ante*, p. 68, and decided at the present term. We are satisfied with the conclusions reached in that case, and hold that the trial court committed no error in overruling such objections. Without directing attention further to the exceptions taken by defendant, and after a careful consideration of the whole case, we are of the opinion they are not well taken, and that the judgment of the court below should be affirmed.

It is so ordered.

BOREMAN, J., concurred.

POWERS, J., concurs in that portion of the opinion construing the Edmunds act, but dissents from the conclusion of the court affirming the judgment of the court below, and files his reasons therefor.

POWERS, J., DISSENTING. This case was argued at the same time as the case of the United States v. Angus M. Cannon, and many of the objections that are here raised were discussed in the latter case, and are considered and determined in the opinions filed. It is, therefore unnecessary to refer to the question raised as to the proper construction of the Edmunds act, so called. There are, however, some features entirely different and distinct, raised by the record in this case, from those that were raised and decided in the Cannon case, and while my brethren are of the opinion that there is no error shown in the record, I am so clearly of the opposite opinion, and so well convinced that a new trial should be ordered, that I dissent from the opinion of the court, and present herewith my views:

1. The first point that is raised by the defendant is that there was not sufficient evidence to justify the verdict of the jury for the offense as defined by the court.

While a careful reading of the record discloses that the testimony was somewhat weak, still I am not prepared to say that the case should have been taken from the jury, and, indeed, in the view that I take of the case, and with the manifest errors that the record discloses, it is not necessary that I should determine that question. I may, however, in passing, refer to one matter. It is contended by the defendant that his entire conduct towards the women designated as his wives, as shown in the testimony, was not only proper, but commendable. It is argued that as he had previously had children by these women, and that these children had been legitimated by the very act which makes it a misdemeanor for a male person to cohabit with two or more women, the defendant was under a moral obligation, if not legally compelled so to do, to support his children and their mothers. That he, therefore, had a right to live with them under the same roof, to eat with them at the same table, to confer with them and to converse with them; to call them by his name, and to treat them in as friendly a manner as he chose, so long as he refrained from sexual intercourse with the women.

The defendant claims that there is no law that requires him to divorce himself from the women. That is true, but the effect of the Edmunds act is to require him to treat these women substantially as he would be required to treat them if he had been divorced from them by a court of competent jurisdiction. In my opinion, a man who has heretofore contracted a polygamous marriage, and has had children by two or more women, is required, as I have stated, to treat those women precisely as he would be required to treat them if he had been divorced from them. A man divorced from a woman is under legal obligations to support his children; he may be required by the decree of the court to support his wife, and to pay to her stated sums at stated intervals, but, with the exception of the business relations which exist between him and his former wife, it is not expected that he will have any further intimacy with her. He may visit his children, he may make directions with regard to their welfare, he may meet his former wife on terms of social equality, but it is not expected, after the decree of divorce, that he will associate with his former wife as a husband associates with his wife, that he will live under the same roof, and, to outward appearances, live with her as a husband lives with his wife. The Edmunds law says that there must be an end, and it puts an end, to the relationship previously existing between polygamists, whatever it was. It says that the relationship must cease.

2. On the trial of this case, bishop Warburton, of the Mormon church, and Charles Brown were sworn as witnesses for the prosecution. Brown is the ward clerk, and he testified that there is a record book kept in his ward, which is in the same ward in which Musser lived, of the births, baptisms and blessings of children. He stated that as clerk of the ward it is a part of his duties to keep such book, and he is its custodian. From his testimony it ap-

peared that about six months previous to the trial, the book mysteriously disappeared. The witness stated that he did not know where it was, that he had made efforts to find it, and that he had been unable to find it. He stated that the book contains, in addition to the record of baptisms, the names of the child and its parents. Bishop Warburton testified that he did not know where the book was, or by whom it had been taken, and stated that he never had blessed any of defendant's children. The question was put to Brown, after he had testified that the book had been taken from his custody, as follows: "By whom was it taken?" And defendant objected, on the ground that the testimony was immaterial; the court overruled the objection and the defendant excepted, and the witness testified that he did not know. The defendant also objected, on the ground that the testimony was immaterial and irrelevant, to the testimony of Bishop Warburton as to his administering blessings to children, and an exception was taken to the admission of the testimony.

This testimony was all clearly immaterial and irrelevant, and should have been stricken out by the court, and the jury instructed not to consider it. True, there is very little in it that may be said to directly injure the defendant, but in its very immateriality the danger lies. It tended to distract the attention of the jury from the real issue, and would have a natural tendency, by leading their minds from the question as to whether the defendant was guilty of cohabitation, to consider the peculiarities of the Mormon church organization. There was also danger that the jury might infer that the defendant was in some way connected with the loss of the book inquired after, when there was no proof on that point. But as the record discloses that the defendant did not see fit to avail himself of his right to move to strike out the testimony, and did not object to many portions of it that were clearly inadmissible, it, therefore, is not necessary to further consider this testimony at this point, and it is only mentioned at this time on account of the bearing that it will be seen to have on this case, when we come to consider some further developments in it, and also the charge of the court and the requests for instructions that were presented by the defendant.

3. The next point that is made by the defendant is of more importance. After the evidence had been closed, the assistant district attorney, in making the closing argument for the prosecution, stated to the jury, in substance, that it was within the power of the defendant to show all the facts in his defense, by his wives and children, but that it was not in the power of the prosecution to show the facts by them, because they had been put out of the way by the procurement of the defendant. One of the counsel for the defendant objected to this line of argument, and the court thereupon remarked, "I suppose there is no evidence as to how they were put out of the way?" All the testimony taken in this case before the jury is brought up by the record, and it discloses that there was no evidence, but that the persons referred to had not been put out of the

way by the procurement of the defendant, or by anybody else, and the court was therefore in error when it said, "I suppose there is no evidence as to *how* they were put out of the way," because that remark could not have failed to convince the jury that it was clearly the opinion of the court, that the persons referred to had been put out of the way somehow, and instead of curing the error caused by the remarks of the district attorney outside of the record, it added additional error, and gives additional ground to the defendant upon which to base his claim for a new trial. A judge has no right to express his opinions upon the facts of the case in the hearing of the jury, in a manner that will have a tendency to affect their verdict. The rule is laid down in many well considered cases, that it is not proper for the judge to make remarks in the hearing of the jury, calculated to influence their finding: Kelly v. Borland, 78 Ill., 438; Furham v. Huntsville, 54 Ala., 263; Wannack v. Mayer, 53 Ga., 162; Hasbrouk v. Milwaukee, 21 Wis., 217; Cronkhite v. Dickerson, 51 Mich.

It appears by the record that after the judge had made the remark that I have quoted, that the district attorney made no further comment on that subject. It also appears that at another part of his argument he stated to the jury that during the trial of the case an outsider had come into the courtroom and made signals with his fingers, as a means of telegraphing to the jury. The defendant's counsel interrupted him and called him to order, upon which the court said "that can be attended to afterward," and thereupon the district attorney ceased to comment upon it. The prosecution contends that the remarks referred to were made in the heat of argument, without any thought of traveling outside the record, and with no purpose or intent to mislead the jury in their consideration of the case. The prosecution submits that the improprieties complained of were inadvertant; that they were not the result of mature deliberation, and that they were not continued All of which I am glad to concede, but the fact that the remarks were inadvertently made, would not remove their natural effect upon the jury. The prosecuting officer, representing and standing for the government, by reason of the very position that he occupies, has more weight and influence with the jury than private counsel. He is supposed to have no more interest in the case than that justice may be done between the government and the prisoner at the bar. He is supposed to be impartial in his investigation of crime, and in his efforts to suppress it. Upon the one hand, he is not to let any guilty man escape, upon the other hand, he is not to allow any innocent man to be convicted. On this account, his words to the jury being presumed by the law, and by the people, for that matter, to emanate from an unprejudiced and unbiased mind, his statements have infinitely more weight, and his remarks should, therefore, be more guarded than those of an attorney who appears in behalf of the defendant. A prosecuting attorney is not a plaintiff's attorney, but a sworn minister of justice;

as much bound to protect the innocent as to pursue the guilty: Wellar v. People, 30 Mich., 23.

His position is one involving a duty of impartiality, not altogether unlike that of the judge himself. The position is a trying one, but the duty, however, exists: Meister v. People, 31 Mich., 104.

He represents the public interests, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simple justice, and he has no right to sacrifice these to any pride of professional success, and, however strong may be his belief in the prisoner's guilt, he must remember that though unfair means may happen to result in doing justice to the prisoner in the particular case, yet justice so attained, is unjust and dangerous to the whole community: Hurd v. People, 25 Mich., 416.

That the remarks of the assistant district attorney were calculated to work injury to defendant and were error, I do not think can be successfully denied. But it is argued that no exception was taken at any time, that there was nothing to except to, that the court was asked to interfere and did so, and that thus the application of the defendant was granted, and that the matter has no place in the record and cannot be considered by the court. It would seem to be too clear for argument that the matter is subject to review by the supreme court. The supreme court has supervisory jurisdiction over the district courts, and whenever it appears that a defendant has not had a fair trial, or that the trial has not been conducted in accordance with the settled rules of law, this court has the power to review the proceedings and to order a new trial. There are many cases in the books in which it has been held that points similar to the one under consideration would be considered by an appellate court. See Scripps v. Reilly, 35 Mich., 391, and cases there cited. It has been many times ruled that counsel, in argument, must not seek to influence the jurors by reference to the matters in the nature of evidence, not in proof before them, and that the trial judge should promptly repress the attempt as something reprehensible: Bullock v. Smith, 15 Ga., 395; Scripps v. Reilly, 35 Mich., 391; Berry v. State, 10 Ga., 511; Mitchum v. State, 11 Ga., 615; Dickerson v. Burke, 25 Ga., 225; Read v. State, 2 Ind., 438; Tucker v. Henniker, 41 N. H., 317; Kennedy v. People, 40 Ill., 488; Hutch v. State, 8 Tex. Ct. App., 417; Austin v. People, 102 Ill., 264; Fox v. People, 95 Ill., 78; Angelo v. People, 96 Ill., 213; Conn v. People, 11 Tex. Ct. Ap., 400; Lanbach v. People, 12 Tex. Ct. App., 590; State v. Kring, 2 Am. Crim. Law Rep., 314; State v. Smith, 1 Am. Crim. Law Rep., 581; Ferguson v. State, 1 Am. Crim. Law Rep., 582; State v. Graham, 17 N. W. Rep., 192.

It has been held that where counsel have travelled outside of the record in addressing the jury, that the error was not cured even by an instruction to the jury not to consider the matter: Morton v. Ordnorf, 22 Iowa, 504; State v. Whit, 5 Jones, N. C., 224.

It is the chief duty of the trial judge to secure fair play to litigants, and, so far as practicable, to shape the order and course of

the proceedings in such a way, that neither party will be put to a disadvantage not due to his case or its mode of management by his counsel. The rules of the court, and what is called the course of the court, have their origin in the purpose to secure fairness in legal controversies, and the order of business and the regulated succession of steps at trials have the same object. The courts have usually been very firm in confining counsel within proper bounds and guarding jurors against unfair and irregular acts and endeavors, and parties have been deprived of their verdicts upon evidence merely indicating the operation of influences about the outskirts of the trial: Scripps v. Reilly, 35 Mich., 390.

It was stated in Tucker v. Henniker, 41 N. H., 322, that it would be utterly vain and quite useless to caution jurors in the progress of a trial against listening to conversations out of the court room in regard to the merits of the case, if they are permitted to listen in the jury box to statements of facts not in evidence calculated to have a bearing upon their judgment, enforced and illustrated by all the eloquence and ability of learned, zealous and interested counsel.

Considering in connection with the remarks of the prosecuting attorney complained of, the fact of the weakness of the testimony, the immaterial evidence received from the witnesses Brown and Warburton, and the remarks of the court upon the objection made to the line of argument of the district attorney, I am forced to the opinion without going any further that there is error in the record, and that a new trial should be granted without any hesitation. It may be that this defendant should be convicted, but the fact that he should be convicted, if such is the fact, does not deprive him of his right to a fair trial according to the law and the evidence.

4. The trial having taken the course that I have indicated, it became the duty of the court, when it came to charge the jury, to very carefully guard the rights of the defendant, and to clearly draw the attention of the jury to the real issue in the case, and inform them that outside matters and irrelevant testimony should not be considered by them. The testimony proper for their consideration should have been pointed out, and the matters and testimony that the jury ought not to consider should also have been called to their attention, but the charge of the court fails to do this. The attempt made to cure the errors that I have indicated was not sufficient. Each and every instruction requested by the defendant is refused, many of them being clearly proper, some being calculated in a slight degree to cause the jury to disregard the matters that had been improperly brought to their attention. The charge simply states the offense, tells the jury that it is brought under a section of the statute of the United States, which is read to them; that the defendant is presumed innocent until proven guilty beyond a reasonable doubt, and that if the jury believe from the evidence, beyond a reasonable doubt, that the defendant, between the dates named in the indictment, lived with the women named therein, or with any two of them, as his wives, in the habit and repute of marriage, they should find

him guilty; that they need not find that he lived with any one of them, or any two of them, all the time, but he must live with them a portion of the time within the dates charged; that it is not necessary to the offense that the defendant should occupy the same bed with the women, or have sexual intercourse with them; neither is it required that a marriage should be celebrated between any of them and the defendant. The jury were told that they must consider the evidence all together, and not go outside of it. They were told that they were the sole judges of the credibility of the witnesses and the weight of the evidence; that they must consider it all together, not giving undue weight to any portion of it; and, in conclusion, they were told that a reasonable doubt is a doubt based upon reason—based on the evidence or the lack of evidence.

Nothing was directly said to the jury with reference to the remarks of the district attorney, or with regard to immaterial evidence introduced in the case. The testimony had a very wide range, extending back for many years prior to the passage of the Edmunds act, and the defendant requested the judge to charge the jury that "the law distinguishes between the continuing of the status of a polygamous marriage and cohabitation between the parties. The former is not unlawful, and its continuance affords no ground for inference of the fact of cohabitation. It is not necessary that the parties to a polygamous marriage should divorce themselves in some effectual way, in order to entitle themselves to the presumption of innocence of the offense of cohabitation." There can be no question but that this instruction is proper, and should have been given, and its refusal was error. That it was proper is readily seen by an examination of the case of Murphy v. Ramsey, 114 U. S., 15.

The defendant also asked the court to instruct the jury that "there is no duty on the defendant to produce in court his children, or the women mentioned in the indictment; nor is there any evidence that the defendant has had any agency in keeping them away, or in preventing the service of subpœna on them, and the jury are not authorized to draw any inference against the defendant from their absence." This request is proper, and should have been given. The only reason that I can conceive for its refusal and the failure of the court to say anything upon this subject in his charge, after the matters had arisen upon the trial, and in the course of the argument to which I have referred, is that the judge must have believed that the jury were entitled to draw an inference against the defendant on account of the absence of those parties. After the court had given this charge, one of the counsel for defendant called the attention of the judge to the fact, that it had been argued to the jury that there is no presumption of law, that on the passage of the Edmunds act, those who had lived in polygamy before ceased to do so, and the defendant's counsel called the attention of the court to the fact that at the time of the argument the court did not correct the prosecuting attorney, and requested a charge upon this point, to which the court replied, "I did not wish to charge upon this point;

I have charged the jury that the law presumes the defendant innocent."

The instruction requested by the defendant's counsel should have been given, and in not giving it the court virtually allowed the jury to believe that there is no presumption of law that at the passage of the Edmunds act, those who had lived in polygamy before, ceased to do so. In my opinion, such is the presumption of law. The court was also requested to instruct the jury that evidence of anything that transpired between the parties—the defendant and his alleged wives—or their relationship between each other, prior to the date named in the indictment, is immaterial, except for the purpose of illustrating their conduct afterwards. The request should have been given, and so ought the jury to have been instructed, as requested by the defendant, that "Evidence has been introduced tending to show the keeping of a record of baptisms and blessings by the clerk of the ward in which the defendant lived. That evidence could only be material for the purpose of showing that the defendant had nominated some of his children for either of those rites, and if the jury find that this defendant did not have have the names of any of his children entered in that book, then that entire testimony becomes immaterial."

I have already called attention in the opinion filed in the Cannon case, to the various requests for instructions, which were made in that case and refused by the court. The same requests were made in this case and refused by the court. The refusal was error. The error is more apparent in this case, the testimony being less substantial than that of the case of the United States v. Cannon.

For the errors that I have pointed out, as well as on account of many others apparent upon the record, I dissent from the opinion of the majority of this court, and I believe that the defendant Musser should have a new trial granted him, because the record discloses that the trial which resulted in his conviction was not a fair trial.

WEST COAST REPORTER.

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CIRCUIT COURT, DISTRICT OF OREGON.

DUNDEE MORTGAGE TRUST INVESTMENT COMPANY *v.* PARRISH, ET AL.

AMERICAN FREEHOLD LAND MORTGAGE COMPANY OF LONDON *v.* GROVES ET AL.

NEW ENGLAND MORTGAGE SECURITY COMPANY *v.* GROVES ET AL.

July 13, 1885.

MORTGAGE TAX LAW OF 1882.—On the question of whether this act of the legislature conforms to the constitution of Oregon, this court follows the judgment of the supreme court of the state, in Mumford v. Sewell, 11 Or., 67, 3 West Coast Rep., 712, and Crawford v. Linn county, id., 482, 5 West Coast Rep., 492; and on the question, is it in conflict with the constitution of the United States, the ruling of this court in the Dundee Mortgage Trust Investment Company v. School District No. 1, 19 Feb. Rep., 359, 2 West Coast Rep., 241, and 21 id., 151, 3 West Coast Rep., 606, is followed.

AN ACT FOR RAISING REVENUE.—The mortgage tax law does not levy any tax or raise any revenue, but only provides that when a tax is levied or a revenue raised, that mortgages shall contribute thereto as land.

UNEQUAL ASSESSMENTS.—Where the law requires that mortgages shall be valued for taxation at their face value, and all lands at their "true cash value," and the assessor of a county willfully and uniformly values the mortgages on lands therein at their face value, and the lands therein at only one-third of their cash value, such assessment is illegal, and the payment of the two-thirds of the tax thereby imposed on said mortgages may be enjoined.

TENDER OF PAYMENT OF TAX.—A suit to enjoin the collection of a tax cannot be maintained in the courts of the United States, unless it appears that the plaintiff has paid or offered to pay so much of such tax as he concedes to be due, or as may be shown that he ought to pay.

SUITS to enjoin collection of tax. The opinion states the facts.

John W. Whalley, W. D. Fenton, Raleigh Scott, for the plaintiffs, for whom also a written argument by *Thomas M. Cooley* was filed.

R. S. Strahan, John Burnett, Jas. F. Watson, E. B. Watson, A. H. Tanner, H. Hurley and *William B. Gilbert* for the several defendants.

DEADY, J. These suits are brought by the plaintiffs, who are foreign corporations, to have the several defendants, enjoined, as sheriffs of their respective counties, from collecting certain taxes levied by such counties upon sundry mortgages belonging to them, under the act of October 26, 1882, session laws, 64, commonly called "the mortgage tax law," by the sale of the same.

Motion for provisional injunctions on the bills and demurrers thereto, on the ground of the invalidity of the law and the illegality of the tax, were argued and submitted together.

The bills are substantially the same, and from them it appears, that the first two corporations are formed under the laws of Great Britain—the Dundee company having its principal office at the burg of Dundee, Scotland, and the London one, at London, England, the third is formed under the laws of Connecticut, and has its principal office at Boston, Massachusetts, and each is formed for the purpose of loaning money in this state on note and mortgage, which notes are made payable and kept without the state at such principal offices respectively; that the Dundee company, as assignee of two former companies of that place, and in its own right, is the owner of six hundred and forty-five thousand three hundred and seventeen dollars and twenty-nine cents in value, of such notes and mortgages for money loaned in this state prior to the passage of said act, except ninety thousand dollars thereof, upon which the various counties named in its bill levied a tax in 1884, amounting to nine thousand nine hundred and twenty-seven dollars and thirty-two cents; that the Connecticut and London companies are the owners of such notes and mortgages for money loaned in this state prior to the passage of said act, upon which a tax was levied by the several counties named in their respective bills, for the years 1883 and 1884, as follows: The Connecticut company, of the value of two hundred and seven thousand three hundred and fifty-nine dollars in 1883, and of the value of two hundred and thirteen thousand two hundred and seventy-four dollars in 1884, and the London company of the value of one hundred and twelve thousand three hundred and sixty-eight dollars in 1883, and of the value of one hundred and fourteen thousand and twenty-seven dollars in 1884, upon the former of which a tax has been levied, by said counties, of seven thousand four hundred dollars and sixty-three cents, and on the latter of three thousand nine hundred and fourteen dollars and seventy-seven cents.

The objections made by the bills to the validity of the law and the legality of the tax may be summarized as follows:

1. The act is void because passed contrary to the constitution of the state, in these particulars: (*a*) it is an act "for raising revenue," but originated in the senate instead of the house, contrary to section 18, article iv., thereof; (*b*) it was not read by sections on three several days in each house, as required by section 19 of said article; (*c*) it involves double taxation and distinguishes between secured and unsecured notes and one and two county mortgages, and permits the indebtedness of residents to be deducted from their assessments and forbids the same in the case of non-residents, contrary to section 1, article ix., thereof; (*d*) it provides that debts and mortgages may be sold for the non-payment of taxes the same as land; (*e*) it is a special or local law for the assessment and the location of taxes contrary to section 23 of said article iv.; (*f*) the plaint-

iffs' mortgages are assessed in said counties at the nominal value of the debt secured thereby, while the other lands situated therein are assessed at but one-third of their value, thereby causing unequal and ununiform taxation of the same kind of property, contrary to section 1 of said article ix.

2. The act is void, because in conflict with the constitution of the United States in these particulars: (*a*) it impairs the obligation of the contract, whereby the mortgagor was to pay all taxes on the note and mortgage, and "in that it undertakes to change the situs of notes and mortgages," which, prior to said act were owned and held elsewhere than in Oregon; (*b*) it impairs the negotiability of promissory notes secured by mortgage on real property; (*c*) the sale of the debt and mortgage involves the taking of private property without due process of law.

3. The assessment in Yamhill county is made or about to be made by the sheriff, and is, therefore, void.

The question of the validity of the act of 1882 was before the supreme court of the state in Mumford v. Sewell, 11 Or., 67, 3 West Coast Rep., 712, and Crawford v. Linn county, id., 482, 5 West Coast Rep., 492, and also before this court in Dundee Mortgage Trust Investment Company v. School District No. 1, 19 Fed. Rep., 359, 2 West Coast Rep., 241, and 21 id., 151, 3 West Coast Rep., 606.

In the cases decided in the state court it was held:

(1) The state may tax a mortgage in the county where recorded without reference to the residence of the owner; (2) an act authorizing a tax does not impair the obligation of any contract between the mortgagor and the mortgagee; (3) the original bill on file in the secretary of state's office, shows that the act was read on three several days, as required by section 19 of article iv. of the state constitution, and that is sufficient; (4) the act is not in conflict with section 1 of article ix., nor section 32 of article i., thereof, concerning uniformity and equality of taxation; and does not exempt two county mortgages from taxation, but leaves them subject thereto under previously existing laws; (5) the legislature may fix the situs of personal property for the purpose of taxation, without violating the provision of the state constitution concerning equality of taxation; (6) the phrase "special law" as used in section 23 of article iv. of the state constitution is synonymous with "private law," and whether a law is public or private depends on the subject matter; and (7) the act in question is a public one, and, therefore, not a private or "special" one.

In the case before this court it was held:

(1) Equity has jurisdiction to enjoin the collection of a tax levied under an invalid law, when necessary to prevent a multiplicity of suits; (2) the act in question does not impair the obligation of any contract between a mortgagor and mortgagee concerning the payment of the tax on the mortgaged premises or the debt secured thereby; the state is no party to such contract, and its power to

impose and collect taxes on persons, property and business within its jurisdiction cannot be affected or restrained thereby; (3) the state may, so long as it does not trench on the constitution of the United States, tax all persons, property and business within its jurisdiction or reach; and whether any person, property or business is within its jurisdiction, is not a federal question, and must be determined by the state for itself.

This court also held in that case that the act was void, because in conflict with section 1 of article ix. of the state constitution, requiring uniformity in assessment for taxation, and also that the act was a special one, and therefore void, because in conflict with subdivision 10 of section 23 of article iv. thereof; and that the enforcement by the state of a tax levied under such an act is a deprivation of property without due process of law, contrary to section 1 of the xiv. amendment of the constitution of the United States.

This court will follow the decisions of the state court touching the validity of this act, when compared with the constitution of the state, and, therefore, all objections to the enforcement of this tax on that ground, are out of place, and will be overruled without further consideration: Greene v. Neal's Lessee, 6 Pet., 291; Stone v. Wisconsin, 94 U. S., 181; Town v. Perkins, id., 267; Burgess v. Seligman, 107 U. S., 33.

Conceding then that the judgments of the state court, in Mumford v. Sewell, and Crawford v. Linn County, so far as they declare the act to be in conformity with the state constitution, furnish the rule of decision in this case, and assuming that the rulings heretofore made by this court, in Dundee Mortgage T. & I. Company v. School District No. 1, so far as the same relate to federal questions, will be followed, there are but two objections to the enforcement of the tax left for consideration: (1) The act is one for raising revenue, and, therefore, void, because it did not originate in the house; and (2), admitting the law to be valid, the tax is illegal, because of the unlawful conduct of the persons who made the assessment of property in these various counties, whereby the plaintiff's mortgages are valued and taxed at two-thirds more than the lands in the said counties.

In Mumford v. Sewell, *supra*, 71, Justice Waldo, speaking for the court, said: "Some of us have had considerable doubt whether the bill is not properly a bill for raising revenue, and, therefore, in violation of section 18 of article iv. of the state constitution, because it originated in the senate," and concludes that the point is not sufficiently clear, as then advised, to warrant the court in declaring the law unconstitutional on that ground. In Crawford v. Linn County, the point does not seem to have been mooted.

But I am clear that this is not a bill for raising revenue. True, it provides that when revenue is to be raised mortgages shall contribute thereto as land. But it does not authorize or provide for levying any tax or raising a cent of revenue. A bill for raising revenue or a "money bill," as it was technically called at common law,

is a bill levying a tax on all or some of the persons, property or business of the country for a public purpose; and the assessment or listing and valuation of the polls or property preliminary thereto, and all laws regulating the same, are merely measures to secure what may be deemed a just or expedient basis for the levying of a tax or raising a revenue thereon.

The constitution of the United States, section 7 of article i., contains a provision on this subject similar to the one in the state constitution. It reads: "All bills for raising revenue shall originate in the house of representatives, but the senate may propose or concur with amendments, as on other bills."

In speaking of this clause, Story, in his commentaries on the constitution, section 880, says: "And, indeed, the history of the origin of the power, already suggested, abundantly proves that it has been confined to bills *to levy taxes* in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue."

By the law in force at the passage of the act of 1882, personal property, including debts secured by mortgage, was listed to the owner in the county where he lived and real property in the county in which it was situated, and both were required to be assessed for taxation at their "true cash value:" Or. Laws, page 752.

By the act of 1882, this proceeding was so far changed that a mortgage on real property and the debt secured thereby is assessed and taxed to the owner thereof in the county in which the land lies, and is required to be valued at the full amount of such debt unless the property is not, in the judgment of the assessor, worth so much, in which case it must be assessed at its "real cash value."

The bills allege that the mortgages of the several plaintiffs are assessed by the assessors in the several counties at the nominal value of the debts, while the lands therein are only assessed at one-third of their value, thereby causing said lands to pay only one-third of the taxes that they ought to pay, and said mortgages two-thirds more than they ought to pay, which is not uniform, but unequal taxation.

Upon the strength of the case of Cummings v. National Bank, 101 U. S., 153, counsel for the plaintiffs insist that this discrimination against the plaintiffs' mortgages renders the assessment illegal.

In that case the officers charged with the valuation of property for taxation in Lucus county, where the bank was located, adopted a settled rule or system by which real and ordinary personal property was estimated at one-third of its value and moneyed capital at three-fifths of its value; and the state board of equalization increased the valuation of the bank shares to their full value.

The bank paid one-third of the tax and brought suit in the United States circuit court against the treasurer to enjoin the collection of the remainder. On consideration of the case in the supreme court, where it was taken by appeal, Mr. Justice Miller said, that "the bank had the same right under the laws and consti-

tution of Ohio, to be protected against unjust taxation, that any citizen of the state has, and by virtue of its organization under the act of congress, it can go into the courts of the United States to assert that right."

The court held that the tax was illegal because the valuation of the property not only operated, but was intended to operate, unequally, in violation of the constitution of the state, which provided for the taxation of all property "by a uniform rule," "according to its true value in money," and for this reason, and not, as claimed by counsel for defendants, that the unequal assessment was in violation of the act of congress relating to the taxation of the shares of the national banks, it granted the relief and allowed the injunction.

But counsel for the defendants also insist that these cases are not within the rule laid down in Cummings v. National Bank, because it does not appear that the unequal assessments here complained of, were deliberately intended; and also, that before the plaintiffs can have relief on that ground it must appear that there was some common design or fraudulent conspiracy among the assessors of these various counties to make an unequal and illegal assessment to the prejudice of the plaintiffs.

But it is not necessary that there should be any actual conspiracy or expressed design to disregard the law in this respect, on the part of the assessor, to render an assessment illegal. Whenever the assessor of a district of a country as large as one of these counties, uniformly estimates real property at only one-third of the value he places on mortgages, it is impossible to attribute the result to the infirmity of human judgment, and the only conclusion possible in the premises is that it was deliberately and willfully done in pursuance of a settled purpose or rule on his part; and where the same thing occurs in a number of counties in various parts of the state, it is manifest that the action of the assessors is not only willful and deliberate, but that it is the result of a general and well understood custom, to substitute this conventional value of real property for "the true cash" one, which the statute requires.

Indeed, the practice is so universal and well known, that the court might take judicial notice of it, and safely assume that there is not an acre of land in Oregon that is valued for taxation at more than one-half its "true cash value," and that generally it is not valued at more than one-third of such value. Nor is it a sufficient answer to this to say, as counsel does, that land in Oregon does not yield an income of six per centum to its owners on its assessed value. For the annual income of land depends not alone or largely on its value, but its use and management.

Probably two-thirds of the taxable land in Oregon is unused, except as wild pasture. The owners of this property do not expect any income from it, nor are they entitled to any. But they are getting the benefit, year by year, of its enhancement in value, from the general growth and improvement of the country, to which they often contribute but very little.

But it is not probable that the money of the country yields an income of more than six per centum. Certainly, if it is loaned at legal interest and pays the usual taxes, it does not. Then, there is always a considerable portion of this capital lying idle, but still subject to taxation. And yet, in the nature of things, personal property, especially money, is more liable to escape taxation than land, and, therefore, it is, that in a country governed largely by land owners, like Oregon, there is more or less under valuation of land, upon the specious plea, more understood than expressed, that this is the only way to keep even with the moneyed capital of the country, and secure something like an equality of burdens between them.

But, be this as it may, the state scheme of taxation is not based on the income derived from property, but its "true cash value," and, therefore, it is useless to institute a comparison between the productiveness of land and money.

Upon this phase of the case I am inclined to think the plaintiffs are entitled to relief against two-thirds of this tax, for if the allegations in the bills are not sufficient as to the deliberation and uniformity with which the land was undervalued by the assessor, there is no doubt but what they can be truthfully made so.

But one of the grounds of demurrer to these bills is, that so far as this phase of the case is concerned, the plaintiffs are not entitled to relief in these suits, because it does not appear that they have paid or tendered so much of the tax as it appears they ought to pay.

This objection is well taken. In State Railway Cases, 92 U. S., 617, the supreme court, in considering this question, say that before a party can maintain a suit to enjoin the collection of a tax, he "must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all taxes assessed. * * * We lay it down with unanimity, as a rule to govern the courts of the United States in their action in such cases." To the same effect is the ruling in National Bank v. Kimball, 103 U. S., 733, and in Huntington v. Palmer, 7 Saw., 335.

The assessment of the plaintiff's mortgages for 1884 in Yamhill county, is made by the sheriff under section 3 of the old territorial act of January 26, 1855, Or. Laws, page 769, section 98, which authorized that officer, to assess and collect a tax on any property which he might find had been omitted from the assessment roll, there being then no provision in the law for a board of equalization. It is suggested that this section was repealed by the act of October 25, 1870, session laws, 52, constituting the county judge, clerk and

assessor a board of equalization, and the suggestion is not without force.

It is also maintained that this section is void under the fourteenth amendment, because it deprives the party affected by the assessment of his property without due process of law, in that it makes the fiat of the sheriff, without notice to the owner, sufficient evidence that his property has been omitted from the assessment roll, and is of a certain value for the purpose of taxation, to which it is thereby made liable without any more to do.

Under the rule carefully laid down by the supreme court in Davidson v. New Orleans, 96 U. S., 104, I think this point is well taken. The listing and valuation of the property is done by the sheriff arbitrarily and without notice to the owner, and there is no provision for correcting his action in either respect, but the collection of the tax follows immediately upon such listing and valuation, and by the sale of the property if necessary. Nor does section 4 of the same act: Or. Laws, page 769, section 99; which authorizes the sheriff upon application of the party interested, to correct certain errors of the assessor, apply to an assessment made by the sheriff under section 3; nor would it be sufficient to make it due process of law if it did. The party aggrieved would still be without notice of the proceeding until the tax was demanded or the property seized for non-payment thereof.

But this proceeding of the sheriff did not, and does not, excuse the plaintiffs from paying the proper tax on their mortgage in this county for the year 1884. Generally, it may be said, that the levy and collection of a tax is a proceeding *in invitum*, to which the taxpayer is only passively a party. But when he becomes an actor in the matter and seeks the aid of a court of equity, to protect him against some threatened wrong in the premises, the situation is changed, and the rule applies—he who seeks equity must do equity—which, in this case, means that the plaintiffs must pay or offer to pay, whatever they ought to have paid, if they had been duly assessed in 1884, before they can invoke the aid of this court to enjoin the sheriff from collecting the tax upon this illegal assessment.

The motions for injunctions are disallowed and the demurrers sustained.

SUPREME COURT OF OREGON.

STATE v. HALE.

Filed June 11, 1885.

CRIMINAL LAW—POSSESSION OF RECENTLY STOLEN PROPERTY—PRESUMPTION.—The presumption raised by the possession by the prisoner of recently stolen property is one of fact from which the jury may infer guilt. And it is error for the court to instruct them as a matter of law, to convict, upon such possession being unexplained.

APPEAL from Umatilla county. The opinion states the facts.

Wm. Ramsey, for the appellant.

Morton D. Clifford, district attorney, and *W. H. Holmes*, for the respondent.

LORD, J. The defendant was indicted for the larceny of certain cattle, tried and convicted, and from the judgment of conviction brings this appeal to this court. There are numerous assignments of error, but after an attentive examination of them, we are satisfied that there is but one material error. The court instructed the jury that "when property recently stolen, is found in the possession of any person, such possession raises a presumption of guilt, and unless he shows that he came honestly into the possession of said property, the law will presume that he stole the same." The objection to this instruction is, that the weight to be given to fact or circumstance, is, under our statute, to be left to the jury; that the court is not authorized to pass upon the weight to be given to any circumstance, or to direct the jury in reference thereto. It is often stated that the recent possession of stolen property by the prisoner unexplained, raises the presumption that he is the thief, and that this presumption shifts the burden from the state to the prisoner. But the presumption raised by such circumstances is one of fact, from which the jury may infer guilt. There is no legal presumption of guilt from the recent possession of stolen property. In Conkenright v. People, 35 Ill., 264, it was held error to instruct a jury upon a trial for larceny, that possession of stolen property soon after it is stolen, is of itself *prima facie* evidence of theft by the possessor and the burden of proving his possession to have been honest, is there thrown upon him. The question is undoubtedly a vexatious one; and upon it, as Mr. Bishop says, "all sorts of utterances are to be found in the books:" Bishop's Crim. Pr., sec. 740. But we regard it as a question of fact and not of law, to be submitted to the jury and for them to determine whether the defendant is the guilty party or not. In Curtis v. State, 6 Col., the court say: "The possession of such chattel as a horse, two months after the theft, is a circumstance to be considered by the jury, but it does not, even unexplained, raise a conclusive presumption of the prisoner's guilt. The jury may, and should, give it proper thought as evidence, but the matter is for them, and they are not bound in such case to convict the prisoner unless they are, upon the whole evidence, satisfied of his guilt." In

State v. Hooye, 50 N. H., 510, this whole subject and the authorities upon it, is ably and thoroughly reviewed, and the result there reached is in conformity with our views. We think the instruction was error. The judgment must be reversed and a new trial ordered.

CITY OF SALEM COMPANY *v.* SALEM FLOURING MILLS COMPANY.

Filed June 11, 1886.

EVIDENCE AND PLEADINGS REVIEWED at length, and decree ordered to be entered in conformity with the opinion.

APPEAL from Marion county. The opinion states the facts.

George H. Williams and *Shaw & Burnett*, for the appellant.

McDougall & Bower and *Th. Ford*, for the respondent.

THAYER, J. This is an appeal from a decree of the circuit court for the county of Marion, rendered in favor of the respondent and against the appellant, in a suit commenced in that court by the respondent to enjoin the appellant from the construction of a certain dam upon what is known as Mill creek, in the city of Salem. The parties are both private corporations organized under the laws of the state of Oregon, for the purpose of operating mills and manufacturing flour, and doing a general milling business.

The respondent alleged in its complaint that it owned and operated two large flouring mills run by water power supplied through the channel of Mill creek, running among other places through the city of Salem, until it reached a point near said mills, where, through a flume it supplied them with water by which they were operated; that respondent was entitled to one-half the water that ran in Mill creek from natural and artificial supply; that it had the right to use and enjoin one-half the waters flowing in said creek, and to make sales of water thereon, and to erect dams upon the same, and to erect, build and maintain a dam at a point known as the "bend" of said creek, at Waller's claim, in said city of Salem, in order to give water to the appellant, whose race entered said creek immediately above the point named for said dam, and that said appellant was entitled to have flow through said race and from Mill creek, one-half the natural flow therein, and what water had heretofore been turned therein from the Santiam river; that the respondent had the right to maintain and repair such dam, and so construct and maintain the same as to cause a fair division of the water aforesaid in two equal moieties between the two parties; that for a period of over ten years a dam had been maintained at said point at the bend of said Mill creek, in order to give and was giving the appellant one-half of said water as aforesaid; that said appellant, on or about the thirteenth day of July, 1883, tore away said dam without any good cause, and against the will or consent of the

respondent, and against its remonstrance; built with heavy lumber, bolts and planks, another dam at the same point, but higher than the former dam, and so constructed the same that the appellant thereby got, or would have got, more than half the water flowing down Mill creek, to wit, about two-thirds thereof, to the injury, etc.; that the respondent, within the then last five days, demanded from the appellant its removal, and after its refusal to remove the same, tore out the central portion of said dam, and commenced work to build another and proper dam instead thereof, with a view of dividing the water equally between said corporations, of which appellant had notice; that the appellant obstructed the respondent and its employees from proceeding with said work, and wrongfully took possession and control of the land adjoining such dam, and the channel of the stream, and had commenced to erect and build a dam of a permanent character, and strongly constructed, similar to the one already torn away, but of such a construction that the appellant will get about two-thirds of the water coming down the channel of Mill creek as aforesaid, to which it was not entitled. And the respondent charged that unless the appellant was enjoined from further proceeding with the building of such dam, a permanent, irreparable injury would be done to the respondent, and it would not be able to run its mills as they were wont, and as respondent had a right to have them run and that a great loss and damage would be done to the respondent, if the appellant was not so enjoined from building and erecting such dam that it was engaged in so wrongfully erecting, against the remonstrance of the respondent, and in violation of its rights; that respondent had no plain, speedy and adequate remedy at law. Wherefore, respondent prayed for a decree of said court restraining the appellant and its servant, or servants, from proceeding further with the erection of said dam, or interfering in any way with the respondent, or its servants, in the erection of a proper dam as above set forth, and costs and disbursements of the suit.

The appellant denied in its answer that it was only entitled to have flow through said race one-half the natural flow of water in said creek, and what had been turned therein from the Santiam river; but averred that it was entitled to have flow into, and through said race one-half of the water as it had theretofore flowed in said creek, and also one-half of the water in said creek, as it might thereafter flow, or be made to flow, including all water from the Santiam river, as well as the natural flow of the said creek; denied that the respondent had the right to maintain or repair said dam, or any dam upon or across said creek, or to construct or maintain the same for any purpose, and denied that the dam theretofore existing at the said bend of Mill creek, gave or was giving to the appellant one-half of the water theretofore flowing through said creek; denied tearing away the old dam without any good cause, or against the will or consent of the respondent, or that against its remonstrance it built another dam at the same point, or that it constructed

any such dam so that it got, or would have received, more than one-half of the water flowing down Mill creek, and denied all injury and damage alleged in the complaint. Averred that the dam referred to in the complaint was an old, decayed and leaky dam, and did not turn one-half of the water flowing to it into the race so as to give appellant the use of one-half of the water flowing in said creek; that appellant proposed to join with respondent in the construction of a new dam in place of said old one, but that the latter refused, and that thereupon the appellant removed the old dam, and with the knowledge and consent of respondent erected a new, good and substantial one in place thereof, which it claimed was constructed so as to divide the waters of said creek equally between the parties. Denied that the respondent demanded the removal of the new dam, and averred that it secretly, and in the night time, destroyed it, and thereby prevented the waters from going to appellant's mill; denied that the respondent commenced the construction of another dam with the view of dividing said waters equally; denied that it obstructed respondent from proceeding with said work, and alleged that the respondent pretended to do some work near said dam for the purpose of harrassing appellant; admitted that another substantial dam had been erected in place of the one torn away by respondent, but denied that by means of it appellant would get more than one-half of the water; averred that the new dam was dividing the water equally between the parties, and denied that any injury would be done the respondent by means of the said dam, or that it would not be able to use its mills as they were wont, or as it had the right to have them run.

The appellant also, by way of counterclaim alleged that on the seventeenth day of December, 1856, the legislative assembly of the territory of Oregon incorporated the Willamette Woolen Manufacturing Company, with power to bring water from the Santiam river to any place or places in or near Salem, through the channel or valley of Mill creek, and with power to enter upon lands and also said creek, and to do all things proper and suitable for the safe, direct and economical conveyance of the water aforesaid. Said corporation was to have exclusive right to the hydraulic powers and privileges created by the water taken by it from the Santiam river, and the right to rent and sell the same or any portion thereof as it might deem expedient; that on the eleventh day of April, 1870, said corporation executed a deed to the Salem Flouring Mills Company for certain real estate, mill machinery, flumes, dwelling houses, wharf and water power, with their appurtenances as therein described.

Said deed contains the following covenants and agreements between the parties thereto: "And the said parties hereto mutually, specially, covenant and agree unto each other, their successors and assigns, and this covenant shall be construed to run with the title to said premises as follows, to wit: That the said Salem Flouring Mills Company, shall be entitled to have the Santiam water which

is introduced to Salem by said Willamette Woolen Manufacturing Company, except the water right heretofore granted to the state of Oregon by contract, divided into two equal parts, and that one-half of the same shall flow and be conducted by the race now in use to the premises herein granted to the party of the second part, and the other half thereof shall flow down in the natural channel of Mill creek, or through such other channel as may be provided; said division of said Santiam water shall be made at or near the dam on the land claim of A. F. Waller and wife, where the race running to the oil mill is taken out of Mill creek. That said Salem Flouring Mills Company shall be entitled to the use and flowage of the natural water of said Mill creek, to the same extent, and in the same manner as the said Willamette Woolen Manufacturing Company is now entitled, but at no time shall said party of the second part, draw, or cause to flow to their works, more than one-half of said natural flow of Mill creek. And it is further covenanted by and between the parties hereto, their successors and assigns, that the said Salem Flouring Mills Company shall pay one-sixth of the expense, or do one-sixth of the labor, and furnish one-sixth of the material necessary to maintain in full use and repair the head race and gates on or near the Santiam river, now owned and used by Willamette Woolen Manufacturing Company for introducing said Santiam water to Salem; also maintain the dam on said Waller's claim. And said Salem Flouring Mills Company further agree to pay one-sixth of the expense, or do one-sixth of the work of clearing out the channel of Mill creek and enlarging the said head race and gates, in case the owners of four of the six water powers in Salem shall, in future, decide to enlarge the flowage of water from said Santiam river to Salem aforesaid. And the said Salem Flouring Mills Company, their successors and assigns, shall pay one-sixth of all damages caused, or to be paid on account of maintaining, continuing or enlarging said head race, works, or the flowage of said waters from the Santiam river to Salem; and it is further covenanted and agreed, that said Willamette Woolen Manufacturing Company, its successors and assigns, shall keep up, or cause to be kept up, the necessary works and improvements to secure the usual flow of the Santiam water through their race and head gates near the Santiam river to Salem at all reasonable times, inevitable accidents excepted, and shall be liable to pay five-sixths of the expense thereof, and the said Salem Flouring Mills Company shall be liable to pay the remaining one-sixth of the expense thereof."

That appellant, by authority of the Willamette Woolen Manufacturing Company, proceeded to construct a new dam in place of the old one, after requesting respondent to join in the construction thereof, but, before putting up the dam, it requested the respondent to examine the plan of the proposed new dam, and its mode of construction, so as to be satisfied that it would fairly and equally divide the water between the parties, and thereupon the respondent sent its engineer, who, with the engineers appointed by the appel-

lant, examined the plans and mode of building said dam, and agreed that it would be a dam when completed, that would equally and fairly divide the water; that after removing the old dam, the appellant constructed on the site of it the new one according to the plans and specifications agreed to by said engineers; that soon after, as before mentioned, the respondent destroyed it, and wantonly and maliciously destroyed the timbers and lumber of which it was constructed; that, thereupon the appellant, by authority of the Willamette Woolen Manufacturing Company, erected the new one; that just before its completion, the respondent, by false representations, obtained from the county judge of Marion county, an injunction to restrain appellant from completing it, and thereupon, the Willamette Woolen Manufacturing Company completed it; that the object and purpose of the respondent in its proceedings, were to prevent appellant from having the use of one-half of the water; that it had machinery and mills of great value wholly depending upon said water for their operative power, which, if the water were diverted, would be rendered of little or no value, and, after alleging other grievances committed by the respondent, the appellant prayed an injunction against the respondent.

A reply was filled on the part of the respondent to the new matter set forth in the answer, in which the respondent admitted the incorporation of the Willamette Woolen Manufacturing Company, as alleged in said answer, but denied that it executed a deed to appellant with covenants as set forth therein, except as especially set out in said reply, in a deed of conveyance of the eleventh day of April, 1870, attached thereto, and marked "Exhibit A," but denied specifically every other allegation of such new matter. The deed of which said exhibit A is alleged to be a copy, is the deed of April 11, 1880, referred to in appellant's answer, and contains the following additional covenant relating to the grant of the water right in the water flowing in said creek, viz.: "And it is covenanted and agreed that the Salem Flouring Mills Company shall have the right to construct a waste gate through the levee, near the creek and block No. 36, or through the flume above the long bridge, so as to discharge all or any art of the water belonging to said Salem Flouring Mills Company into the bed of South Mill creek, as the convenience of said party of the second part may require. And it is further understood and agreed, that in case any time hereafter, said Willamette Woolen Manufacturing Company shall desire to introduce Santiam water to Salem for the purpose of watering the city, they shall have the privilege of diverting a sufficient amount of water from Mill creek above Salem for such purpose; provided, always, that they introduce and cause to flow into the channel of said Mill creek a sufficient amount of Santiam water, additional to what is used for milling purposes, as will make said mill powers at Salem as good as before the use of any part thereof for watering said city. And in case said Salem Flouring Mills Company shall desire to take a sixth part or interest in said project of watering

said city of Salem, they shall be entitled to do so by paying one-sixth part of the cost of said water works and paying one-sixth of all expenses thereof at the time when the same are constructed."

These are the substantial issues in the case. There were many charges of bad faith, and criminations and recriminations made, but they do not affect the main points.

The pleadings are very extensive, though the issues tendered by them may, taken all together, be resolved into a simple question of controversy. Each of the parties had flouring mills, each required the water that flowed down Mill creek to operate them, and each was confessedly entitled to one-half the water thereof. The appellant, in order to secure a flow of the water to its mills, was compelled to have a dam across the creek, at a point below and near the mouth of its race. Its right to a dam is conceded, and the point of its location had, long prior to the time of the commencement to build it, been selected. The condition of the old dam as to decay, and being out of repair, is made an issue in the case, but certainly not a very important one, as the covenant in the said deed of April 11, 1870, expressly required the appellant to maintain the dam. The appellant alone was interested in keeping it up, and if it built a new one every six months, the respondent was not affected at all. The respondent was only entitled to one-half the water, and without the dam it would get all of it. It was necessary, therefore, for the appellant, as well as obligatory upon it, to have a dam, and unless the building of it in some way interfered with the respondent's getting its half of the water, the latter had no cause of complaint The pleadings show that the appellant had authority to build the dam, subject only to the restriction that it should be built on the site on Waller's claim where the old dam was situated, on the said eleventh day of April, 1870; that is, the covenant to maintain the dam—the old dam—implied the right and imposed the obligation upon the appellant to rebuild it; otherwise, it could not be maintained. The maintenance of the dam would probably imply that, in the event of its having to be rebuilt, it should be built on the same spot. This would be the strongest construction that could be claimed against the appellant. The hight of the dam and the manner of constructing it are, so far as appears from the pleadings, unrestricted. The appellant is limited by the terms of the covenant as to the amount of water it is entitled to; that is, it is entitled "to have the Santiam water which is introduced to Salem by said W. W. M. Co., except the water right heretofore (theretofore) granted to the state of Oregon by contract, divided into two equal parts, and that one-half of the same shall flow and be conducted by the race now (then) in use to the premises herein (therein) granted to the party of the second part, and the other half thereof shall flow down in the natural channel of Mill creek, or through such other channels as may (might) be provided." As to the water naturally flowing in said creek, the appellant is by said covenant restricted as follows: "That said Salem Flouring Mills Company shall be entitled to the use and flowage of the natural

water of said Mill creek, to the same extent and in the same manner as the said Willamette Woolen Manufacturing Company is now (then) entitled, but at no time shall said party of the second part draw or cause to flow to their works more than one-half of said natural flow of Mill creek."

It may be inferred from the pleadings, and the proofs shown, that the respondent, since the execution of the said deed of April 11, 1870, has succeeded to the rights of said Willamette Woolen Manufacturing Company in said water, and occupies the relation to the appellant of a purchaser of those rights from said woolen company, under a purchase thereof subsequent to the execution of that deed. It may, therefore, be deduced from the pleadings alone that the respondent had the right to have one-half of the water that flowed in Mill creek, including the water from the Santiam river and that which ran naturally in said creek, "flow down the natural channel of Mill creek, or through such other channels as may be provided," subject to the water rights granted to the state as referred to in said covenant, and that the appellant had the right to have the other half thereof turned into its race, and that it had the authority, and was compelled, at its own expense, to maintain the dam on Waller's claim that existed on April 11, 1870, and that the maintenance of the dam implied the right to rebuild it whenever in its discretion the exigency demanded it.

I am satisfied that a careful reading of the covenants in said deed of April 11, 1870, will convince any one that the conclusion above suggested is the only proper one that can be drawn therefrom, and I am not able to discover why the agents of the respondent need to have been exercised on account of the building of the dam in controversy by the appellant. The right to build a dam at the point where this dam was located, and to turn the water into the appellant's race, we may infer from the pleadings was secured from Waller, and if the right granted for the purpose did not authorize the kind of dam the appellant constructed, then Waller, or his successors in interest, have a right to complain, but no one else has, unless he can show that his vested rights are thereby injuriously affected; and I do not understand that the respondent claims, or has attempted to show, that it has succeeded to Waller's residuary interest in the claim upon which the dam was built. It is, however, claimed by the respondent that the character of the dam the appellant was constructing when the suit was commenced would not enable the water to be divided equally, but that would be the misfortune of the appellant. Its covenant limited it to the use of one-half of the water, and it would have no right to take more under any circumstances; if it did, it would render itself liable to damages, and to be enjoined from so doing. The respondent had no right to dictate the kind of dam the appellant should construct, but it had the right to object to its taking more than its half of the water. The appellant had bound itself by its covenant not to do so. "That the Salem Flouring Mills Company shall be entitled to have the Santiam water, etc.,

divided into two equal parts, and that one-half the same shall flow and be conducted by the race now in use to the premises herein granted to the party of the second part, and the other half thereof shall flow down in the natural channel of Mill creek, or through such other channel as may be provided." "That said Salem Flouring Mill Company shall be entitled to the use and flowage of the natural water of said Mill creek, etc., but at no time shall said party of the second part draw or cause to flow to their works more than one-half the said natural flow of Mill creek," is the language of that instrument. When the appellant turns into its race more than one-half the water flowing in said creek, then the rights of the respondent are invaded, and if it should threaten to do that, and there was a well-grounded apprehension that it would carry the threat into execution, a court of equity might interfere to prevent it. But the respondent has no right to complain about the dam, though it were built eighteen feet high, and diagonally across the stream, unless it could show that it would necessarily cause to flow into said race more than half of said water. The dam does not divide the water. It creates a head so as to enable the appellant to turn into its race its portion of it. The race might not be of sufficient capacity to receive half the water; then how would the dam cause the respondent injury? It commenced its suit prematurely. The appellant had not violated its covenant not to take more than half the water, nor threatened to, and respondent's rights were not affected nor jeopardized. The most that can be said against the dam is that the plan of it is such as will render it inconvenient to divide the water accurately, but the appellant will necessarily be the sufferer from that circumstance. If it takes more than half the water in any event, it will do so at its peril. Besides, there are no facts alleged in the complaint showing why the dam in question could not be employed so as to enable an equal division of the water to be made. The evidence shows that it has been constructed with weirs to gauge the water that passes into Mill creek, and that the water discharged into appellant's race passes through weirs provided for the like purpose.

I am unable to see how the suit can possibly be maintained upon the pleadings in the case. There has been a mass of testimony taken tending to show the comparative amount of water the parties have been receiving since the dam complained of has been used, but it fails to prove that the structure is of such a character that an equal division of the water cannot be secured by means of it, and that is the vital issue the respondent must maintain to support his case by the record. Its complaint is against the construction of the dam, and the relief demanded is that the appellant be restrained from proceeding further with the erection of it, or from interfering with the respondent in the erection of a proper dam, with a view of dividing the water equally between the parties, but why the dam the respondent proposed to build will effect that end any better than the one in question, the complaint wholly fails to state. It is idle to

allege that the dam the appellant was constructing would not divide the water equally and that another one would, without pointing out the difference between them or giving any reason why the one would be superior in excellence to the other, and yet that is the condition of the respondent's complaint in the case. A court of equity has undoubted authority to regulate the use of water the right to which belongs to two or more persons in common, so as to preserve the right of each owner: Gould on Water, sec. 540; Angell on Water-courses, sec. 447, and cases referred to in the notes. But this suit is not brought for that; the complaint was not framed in view of such remedy, nor does the relief demanded therein include it. A suit of that character would, under the circumstances, have been a very appropriate proceeding. The squabble between the officers of the two corporations, resulting in the pulling down and destroying of one dam, and the preventing by force the erection of another, was unworthy of the gentlemen who occupied those positions. The door of the courts was open for the settling of the controversy, and they should have resorted to them in order to secure its adjustment. The respondent did begin a suit, but it entered the controversy in the forum where it had ended in the field. It was to complete by law what it had failed to effect by force, the preventing the appellant from building a dam, and the opportunity to build one itself.

The circuit court strode over the case made by the pleadings, and attempted to adjudicate upon it the same as though it had been regularly and properly presented by the allegations of the parties. That course was a practical disposition of the affair, but I think the court should have directed the pleadings to have been amended so as to have had the decree in accordance therewith. It is a well established principle of the law that a party must recover *secundum allegata et probata*, and aside from that, the decree of the court settled nothing. It found as a fact that the appellant was receiving twenty-five per cent more of the water than the respondent was, and as a conclusion of law, that the respondent was entitled to receive twelve and one-half per cent more water than flowed to it through the three open weirs which discharged into Mill creek; and decreed that the respondent have authority to enlarge one of said weirs so as to discharge into said creek twelve and one-half per cent more water. Relief of that character could not properly be decreed in that way. The decree should have been made so as to have required the appellant to desist from turning the amount of water it was using into its race, compelled it to lessen the size of its weirs so as to draw off no more water than was discharging into the creek. The decree should have been made so as to operate personally upon the appellant; then if it did not obey it, its officers could have been attached for contempt of the court. Authorizing the respondent to enlarge the weirs discharging into Mill creek would lead to endless controversy, whenever it exercised the authority granted by the decree. The appellant would have been

very likely to have claimed that the enlargement was greater than had been permitted, and in turn have commenced a suit to restrain the respondent from taking so large an amount of water. Besides, it would not have been prudent to leave such a matter to an interested party to adjust, and is not in accordance with the usual course of judicial proceedings. It is too much in the nature of a reprisal.

The authorities maintaining the jurisdiction of a court of equity to adjust the rights of parties having a common interest in water for hydraulic purposes, are numerous, but I have been able to find but one which indicated with any decree of particularity the manner in which the adjustment should be made. That is the case of Olmstead v. Loomis *et al.*, 9 N. Y., 4, which in some respects was similar to this, though the facts were more complicated. The court there held, that the true and proper remedy was in the court of chancery, and that the mode by which the controversy could be determined with the least expense and the greatest certainty of doing justice, was by a reference to one or more suitable referees, one of whom should be a capable engineer or millwright. The court said that "such a referee can learn more of the true merits of the case in a day, upon an actual view and examination of the mills and premises, than a jury or court can ever learn from hearing or reading the testimony of witnesses. * * * This course of proceeding by a referee and view, has another advantage over an action at law. It enables the court to exercise its power of preventing future litigation. Powers may be given the referee to prescribe and establish, under the direction of the court, some fixed mechanical gauge by which the quantity of water to which the plaintiffs are entitled, may be kept within the main race, and not drawn off into the defendant's side race. This has frequently been done in some cases of this description; and when parties cannot otherwise agree, and are disposed to be litigious, it is perhaps the only mode of preventing continual irritation and litigation between them:" Id., 430, 431. If, in the present case, a course had been adopted similar to that suggested in Olmstead v. Loomis, it would have been much more satisfactory than a hearing upon depositions or oral testimony. The authority of the court to appoint a referee to ascertain any fact in civil action, suit or proceeding, is ample: Civil code, section 938, subdivision 2. By that mode a decree could have been rendered that would have judiciously adjusted the matter in controversy between the parties, and been final so long as the condition of their affairs remained unaffected by forces beyond their control.

The proofs, however, in the case, disclose a case that embarrasses very much its settlement. It appears that two persons, Stratton and McCornack are riparian owners of the land at the point where said dam is located, and for some considerable distance above and below it, and that they have, at a recent date constructed a race connecting with Mill creek at a point immediately above said dam, and by means of which they conduct a quantity of the water thereof

through their premises, and discharge it into the creek at a point below the dam; that they have constructed head gates at the mouth of their race, and from time to time turn into it from the creek a supply of water sufficient to run a small mill owned by them. The water discharged from their race runs down to the respondent's mills, and unless the amount thereof is estimated in the division of the water of said creek between the appellant and respondent, as provided in the said covenant, the latter will obtain that amount more than one-half of it. It was claimed by the respondent upon the argument that the circumstance last referred to should not be considered, for the reason that Stratton and McCornack had no right, as against either of the parties, to divert the water of the creek, and that the covenant in the said deed of April 11, 1870, specified that the division of the water of the creek should be made at the dam. It may not appear from the proofs that Stratton and McCornack have any right to turn the water into their race, but it would not be safe or prudent to adjudge that they had no such right in a case to which they were not parties. The adjudication would not, of course, bind them, and an attempted settlement of the rights of the parties to the suit, made upon the assumption that Stratton and McCornack were wrong-doers in their diversion of the water, would leave the matter in uncertainty and doubt.

In regard to the division of the water at the dam, the language of the covenant is as follows: "Said division of said Santiam water shall be made at or near the dam of the land claim of A. F. Waller and wife, where the race running to the oil mill is taken out of said creek." Whether this language would necessarily require the division to be made below the mouth of Stratton and McCornack's race is not, as I view it, important. Each of the parties to the suit is entitled, as a matter of right, to one-half of the Santiam water and of the water naturally flowing in the creek. The division is to secure to each of them that right, and if, by means of the race, a material part of the water is turned off above the point of division, but the respondent receives the benefit of it, the same as it would if not diverted, it must, as a matter of equity, be considered in the admeasurement of the water each is to have. The claim to such extra amount of water is unconscionable, and in violation of the maxim that "equality is equity;" and, besides, there is nothing shown in the case that would estop Stratton and McCornack, if made parties to the suit, from proving that they had obtained a right, either from the respondent or from the Willamette Woolen Manufacturing Company, prior to the acquisition by the respondent of its interest in the premises, to divert and use the water in the manner they have done.

It is impossible, in my opinion, to sustain the decree of the circuit court, or to grant the respondent any relief upon the pleadings as they are framed, consistently with equity and justice. The ordinary course, in such a case, would be to dismiss the complaint, but a large amount of testimony has been taken tending to show the amount of

water the parties respectively are receiving; many of the witnesses were professional experts in hydraulics, and a large expense has been incurred. The cause ought to be definitively settled, but it cannot be done unless it is sent back to the circuit court, the complaint amended, and Stratton and McCornack made parties. A referee could then be appointed to ascertain and report a proper mode for dividing the water. I have not examined the testimony with a view of determining which party has been receiving the most of the water that flows in Mill creek. I had an impression, when the case was argued, that the appellant was getting the larger portion of it, if the amount turned into Stratton and McCornack's race was not included, but all that evidence was in regard to water received by the parties after the commencement of the suit, and was irrelevant to the issue made by the pleadings. The threatened building of the dam was the "head and front of the appellant's offending," and there was no cause for that. If the dam was so constructed that the weirs in the head-gate of appellant's race would discharge more water into the race than the same number and sized weirs in the dam would discharge into Mill creek, the difference could easily be remedied. The circuit court seemed to have no difficulty on that point. But the several amounts of water the parties receive can never be adjusted with mathematical precision. A fair, practical division of it is all that can be made. The more important determination is to establish the mode by which the division shall be made in view of all the circumstances of the case.

A decree will be entered in accordance with the principles of this decision.

NOTE.—Upon a motion for a rehearing of this case, it was ordered that the complaint be dismissed without prejudice.

PARKER v. METZGER ET AL.

Filed June 25, 1885.

ADVERSE POSSESSION, TITLE VESTED UNDER.—Adverse possession of land, for the period prescribed by the statute of limitations, vests a perfect title in the possessor as against the former holder of the title and all the world, and entitles him to all the remedies at law or in equity which are incident to possession under written titles.

APPEAL from Multnomah County. The opinion states the facts.

O. F. Paxton, for the appellant.

W. T. Burney, for the respondent.

LORD, J. The substance of the facts as found by the referee, and out of which the main contention arises, are: That on or prior to the fifteenth day of November, 1865, the plaintiff owned and was in possession of, as a part of her portion of the donation land claim of Davis Duvall and wife, the northeast quarter of the northeast quarter

of section fifteen, township one south, range three east, in Multnomah county, Oregon; that upon said date the plaintiff, then Priscilla Duvall, joined with her husband, Davis Duvall, in a conveyance of land in which said forty-acre tract, the land in dispute, together with other property, was deeded to one Tomlinson; that the said forty-acre tract was included in said conveyance by mistake of both parties, the intention of all parties being to convey only the land of Davis Duvall; and that the plaintiff joined in said deed solely for the purpose of barring her dower, the intention being to further vest in said Tomlinson the west half of the northwest quarter of said northeast quarter section, which he had purchased, and by similar mistake the said twenty-acre tract was not so conveyed; that no consideration was paid plaintiff or her said husband for said forty-acre tract deeded to Tomlinson, and that said twenty-acre tract was occupied by Tomlinson thereafter, and has not been in the occupation of plaintiff since said conveyance, and the said mistake was not discovered by plaintiff or any one until about the year 1874; that in July, 1874, the said Tomlinson died, leaving minor children surviving him, none of whom are of age; that on the ninth day of May, 1882, a guardian's deed was made to the defendant Metzger, of said premises, under a sale previously made by the guardian of said minors, under an order of the county court, and the said guardian's deed was placed upon record before the commencement of this suit; that the said defendant, Metzger, had actual notice of the claim of plaintiff to said land, before purchasing at said guardian's sale, and that the plaintiff is the owner as to said defendants of said real estate, and that the defendants have no right, title or interest therein or thereto; that from and after said conveyance to said Tomlinson, the plaintiff and her husband continued to cultivate said portion of said forty-acre tract, lying within her enclosure; and the plaintiff has continued in the occupation and cultivation thereof up to the present time, and has cut timber and sold timber from said forty-acre tract within four or five years after said conveyance was made; that all of said acts of ownership of said land by the plaintiff were done under the claim of ownership of all of said land adversely to all persons, and the said acts and the claim of ownership were open and notorious, and were well known to said Tomlinson during his lifetime. These facts as found, we think, are substantially sustained by the evidence.

The suit is based upon two grounds, either of which, it is contended, entitles the plaintiff to the relief prayed for. Upon the first ground, the plaintiff claims the legal title to the forty-acre tract of land in dispute, by reason of adverse possession under a claim of title, and insists that being in possession of the premises, and invested with the title by operation of the statute of limitations, and the defendants claiming some interest therein adverse to her, she is entitled to the relief sought. On the other hand, it is contended that the statute of limitations does not vest the title in the person who holds the lands under it—that it affects the remedy only and not the right,

and that plaintiff, not having the legal title, has no standing ground upon which she can maintain this suit. In support of this position, we are referred to Goodwin v. Morris, 9 Or., 322, and Myers v. Beal, 5 Or., 130. But neither of these cases were actions or suits concerning title to real property; and as to actions of tort or upon contract, as decided in those cases, the law seems to be that the statute bars the remedy only.

But the question here directly is, whether our statute bars the right, and vests the title in the party who brings himself within its provisions. If it does, then it is conceded that the suit may be maintained.

This question has been very ably and thoroughly examined and answered by Mr. Justice Sawyer in Arrington v. Liscom, 34 Cal., 380. In that case the suit was as here, to quiet title, and after an elaborate review of the authorities, the result reached was that adverse possession for the full period limited by the statute confers title, and that it is such title as entitles the holder to all the remedies to quiet his possession that are incident to possession under written titles. In the course of his opinion, he said: "Some recent statutes provide in express terms that adverse possession for the time prescribed shall extinguish adverse titles and vest the possessor with the fee. Ours contains no such express provisions, but is not that the effect of our statute when properly construed? Angell says, in the language of Mr. Chancellor Harper, in Drayton v. Marshall, 1 Rice's Eq., 385, 'The belief is that no case can be put in which a private individual knows that another person claims, and is in the actual enjoyment of land which belongs to him, and neglects to prosecute his rights at law, when there is nothing to prevent his doing so, that he will not be barred by the statute of limitations:' Angell on Lim., 397, sec. 2. And Angell further says: 'It is also unquestionable that where the land has been held under a claim to the fee, for the time prescribed by the statute, and an entry is made by the party who has the written title, such party may be dispossessed by an ejectment brought by him who has so held and claimed:' Id., 398, sec. 2. This was so held in Jackson v. Oltz., 8 Wend., 440. The lessor of the plaintiff had been in possession for the period prescribed by the statute, claiming title under a patent. Defendants afterwards entered and held under a title which had been judicially determined to be valid. The action was brought by the plaintiff's relying on the title acquired by adverse possession, against the defendants holding such paper title, and a recovery had. The court say: 'If the possession was adverse, and had been so for more than twenty years, as it had in this case, then the possession ripened into a title, and the plaintiff must recover against the defendant, though the paper title to the fifty acres is, in reality, not in him.' The same principle is recognized in Jackson v. Dieffendorf, 3 John., 269. And in Jackson v. Rightmyer, 16 John., 327, Mr. Chancellor Kent says that showing a possession of thirty-eight years under a claim of right 'was showing an absolute right of pos-

session sufficient to toll an entry.' Our statute of limitations relating to real estate is copied from the statute of New York with but slight verbal changes; and we are not aware of any provision in the statute of New York which would affect the construction on this point. In Bradstreet v. Huntington, Mr. Justice Johnson says 'that an adverse possession, when it actually exists, may be set up against any title whatsoever, either *to make out a title* under the act of limitations or to show the nullity of a conveyance executed by one out of possession. On the first two of the propositions there can be no doubt, and none has been expressed:' 5 Peters, 438. And in Drayton v. Marshall, Mr. Chancellor Harper says: 'The time then required to *mature* a *title* by the statute of limitations had run out more than five times before the filing of this bill:' 1 Rice's Eq., 384. And again: 'But if, by the statute, the defendants have acquired a title to the fee, they can, of course, have no right of redemption against themselves. This must be merged or extinguished in the fee:' Id., 386. These remarks all go upon the idea that adverse possession for the time prescribed confers upon the possessor some interest, some positive right; that it affords him something more than a shield—in short, invests him with title. In Le Roy v. Rogers, 30 Cal., 234, we said: 'Rogers' *title, thus acquired by adverse possession*, the claimants under the patent having a right of action and being under no disability, could not be impaired by an entry by them claiming under the patent, unless made in pursuance of a judgment to which Rogers was a party or privy.' So in Taylor v. Horse, 1 Bun., 119, Lord Mansfield said, 'Twenty years' adverse possession is a *positive title* to the defendant. It is not a *bar to the action or remedy only, but it takes away the right of possession.*' To the same effect are Stokes v. Berry, 2 Salk., 421, and Pederk v. Searle, 5 S. & R., 239. In Leffingwell v. Warren, 2 Black., 605, the supreme court of the United States says: 'The lapse of time limited by such statutes *not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder.*' So in School Dist. v. Benson, 31 Me., 384, the court say: 'A legal title is equally valid, when once acquired, whether it be by disseizin or by deed; it vests the fee simple, although the mode of proof, when adduced to establish it, may differ. * * * When the title is in controversy, it is to be shown by legal proof, and a continuous disseizin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by the existence of the facts, and not by an exhibition of them in evidence. An open, notorious, exclusive and adverse possession for twenty years would operate to convey a complete title to the plaintiffs, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it, and the appropriate mode of conveying, is by deed.' See, also, Barnish v. Thompson, 7 Term R., 492; Beckford v. Wade, 17 Ves., Jr., 87; Moore v. Luce, 29 Pa. St., 260; Thompson v. Green, 4 Ohio St., 223; Newcombe v. Leavitt, 22 Ala., 631; Chiles v. Jones, 4 Darr, 483."

And again: "Whatever may be true of personal contracts, it certainly cannot be said with reference to realty, in view of the authorities cited, that the statute only takes away the remedy, or that a right, a title, is not practically extinguished by one party and acquired by another. The five years' adverse possession, practically at least, is conclusive evidence of title in the possessor, and if conclusive evidence of title in him, it must be as conclusive of no title in the other. What is the legal definition of title to land? A title is thus defined by Sir Edward Coke: '*Titulus est justa causa possidendi id quod nostrum est;* or it is the means whereby the owner of land has just possession of his property:' 2 Black. Com., 195. If this definition presents the true idea of title, then, when a party's means of obtaining possession, or maintaining possession when obtained, have been extinguished by an adverse possession, it would seem to follow that his title is effectually and substantially extinguished in fact, whatever his condition theoretically may be. And the party who has acquired an absolute right of possession, which will not only shield him in his possession against the attacks of all the world, but, when ousted, will restore him to, and protect him in, his just possession, even against the party having the written title, would seem to have a substantial title. We can see no reason why, for all practical purposes, such a party's title should not be regarded, both in law and equity, as good as though he also had a perfect written title; and we are dealing with practical, and not merely theoretical, questions. If a party's right of possession has become absolute, has by long adverse possession ripened into what may as well and as properly, for practical purposes, be called title as anything else, so that he can maintain his possession, or recover it when ousted, or maintain all actions for injuries to it against the party having the written title, in all respects in the same manner and to the same extent as against parties who never were other than entire strangers to the premises; if the party having the written title has lost, by the adverse possession, all means of recovering or protecting a possession when acquired without action, and all means of establishing or maintaining any right against the adverse possessor, we can perceive no good reason why such adverse possessor should be annoyed by pretended claims, or have the value of his possession diminished by an apparent title which has lost its vitality. We see no good reason why the party whose adverse possession has practically ripened into a title should not be entitled to all the remedies to quiet his possession that are incident to possessions under written titles, which are, in law and equity, no more efficacious to protect the owners in the actual enjoyment of their possessions under them. Statutes of limitation are said to be statutes of repose. If so, they should be so construed and administered with respect to cases falling within their purview as to afford complete, not merely partial, repose."

To the same effect is the case of Pendleton v. Alexander, 8 Cranch, 462. The action was by the party in adverse possession against the

other claimants out of possession, and a decree establishing title and granting affirmative relief quieting it was rendered based upon a title acquired by adverse possession. Mr. Chief Justice Marshall said: "The appellant's *title* being secured by possession of more than fifty years, is unquestionably good, and it is proper that the doubts that hang over it should be removed." The statute under which this was done only purported by its terms to bar the remedy; it did not provide that the title of the owner should be extinguished, or that the possessor should be invested with a title. In Sherman v. Kane, 86 N. Y., 64, it is held, where title to land has been acquired by twenty years' adverse possession, it is equally as strong as one obtained by grant, and it is not forfeited by an intermission of the actual occupation thereafter. The court say: "If the title had been acquired by grant, such an act could not affect or invalidate it, and as *title by adverse possession is equally strong as one obtained by grant*, no reason exists for making an exception against the latter. A perfect answer, also, to the position of the learned counsel is, that the city had *title* by adverse possession, and that title continued after it had become perfect and complete, without regard to the interruption of the actual occupation or possession."

It thus appears that adverse possession for the time prescribed vests a perfect title in the possessor as against the former holder of the title and all the world; and that he is entitled to all the remedies at law or in equity which are incident to possession under written titles. See, also, Jones v. Brandon, 69 Miss., 586; Hinchman v. Whetstone, 23 Ill., 189; 3 Wait's Actions and Defenses, 19; Cannon v. Stockman, 36 Cal., 541. It is hardly necessary to review in detail the testimony. It shows satisfactorily to us that the possession of the plaintiff has been adverse, exclusive, unbroken, open and notorious. She has always claimed to be the owner, and as such she has paid the taxes on this land, erected a building on it, set out fruit trees on it, grubbed and cleared part of it, seeded it with timothy and clover, cut hay off it, made and changed fences on it, used firewood from it, sold shingles and rail timber off of it, some seasons cultivated it, and in all these various ways actually possessed and exercised acts of ownership over it.

Upon the second point, upon which it is claimed the plaintiff is equally entitled to the relief asked, the conclusion above reached renders it unnecessary to pass further than to remark that the case cited in School District v. Wrabeck, 31 Minn., 77, seems to sustain the view urged by counsel for plaintiff.

The decree of the court below must be affirmed.

WEST COAST REPORTER.

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CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MERCARTNEY *v.* CRITTENDEN ET AL.

July 28, 1885.

COSTS—FINAL HEARING IN EQUITY—SECTION 824 REVISED STATUTES CONSTRUED.—To constitute "a final hearing in equity or admiralty," within the meaning of section 824, R. S., there must be a hearing of the cause on its merits, that is, a submission of it to the court, in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or libellant has made out the case stated by him in his bill or libel, as the ground for the permanent relief which his pleading seeks, on such proof as the parties place before the court, be the case one of *pro confesso* on bill, or libel and answer, or pleadings alone, or pleadings and proofs

IN EQUITY. Appeal from clerk's taxation of costs.

D. T. Sullivan, for complaint.

J. L. Crittenden, for defendant.

SAWYER, C. J. The bill was filed September 4, 1884. Demurrer filed December 9, 1884. The demurrer having been argued and submitted, it was overruled on March 2, 1885, and leave given to answer upon payment of the usual costs. On April 4, the defendants answered fully to the merits. On May 1, 1885, the court dismissed the bill without prejudice, without looking into it, on the voluntary application of the complainant, the defendants not appearing, and not being present. The question, is, whether defendants are entitled to the docket fee taxable under section 824, revised statutes, on a "final hearing" in equity. The clerk allowed the item, in pursuance, as he construed the decision, and ruling in the circuit court for the eastern district of Tennessee, in Goodyear v. Sawyer, xvii. F. R., 3. But all the cases, including Goodyear v. Sawyer, were fully reviewed by Mr. Justice Blatchford, of the supreme court, on the circuit, in Wooster v. Handy, xxiii. F. R., 50; and the ruling in Goodyear v. Sawyer, on this point, was overruled.

The rule deduced from the cases, and adopted by Mr. Justice Blatchford, "is, that to constitute a 'final hearing in equity, or admiralty,' within the meaning of section 824, there must be a hearing of the cause on its merits; that is, a submission of it to the court in such shape as the parties choose to give it, with a view to a determination whether the plaintiff, or libellant, has made out the case stated by him in his bill, or libel, as the ground for the permanent relief,

which his pleading seeks, on such proofs, as the parties place before the court, be the case one of *pro confesso*, on bill or libel and answer, or pleadings alone, or pleadings and proofs. Nor does it detract from the force of this conclusion, that what is called an interlocutory decree, as distinguished from a final decree, is often entered as the result of a decision on a final hearing."

I shall adopt this conclusion as better supported by authority, as well as reason, as to the proper construction of the provision of section 824 in question. There was no replication in this case, and it was not at issue. There was no question of law submitted for consideration and determination by the court. The complainant, voluntarily, upon *ex parte* application, asked the court for leave to dismiss the bill; and the court granted the order, without looking into the pleadings, or deciding any point of law or fact. Had there been a final decree entered upon the ruling on the demurrer, without further pleadings, the hearing on the demurrer might well have been regarded as a "final hearing," contemplated by the act. (See McLean v. Clarke, xx. The Rep., 36.) But the decree dismissing the bill was not a consequence of the decision on the demurrer. The item of twenty dollars, solicitor's fee, charged on the bill of costs filed by defendants, must, therefore, be rejected, and it is so ordered.

SUPREME COURT OF NEVADA.

STATE *v.* NEVIN.

Filed July 25, 1885.

SURETIES—OFFICIAL BONDS—STATUTORY DUTIES IMPLIED.—A bond requiring a faithful performance of official duty, is as binding upon the principal and his sureties, as if all the statutory duties of the officer were inserted in the bond.

THE SAME—LIABILITY FOR PUBLIC MONEYS STOLEN.—Under the statutes of Nevada, it is the duty of a county treasurer to safely keep the public moneys, and pay it out only as provided by law. Consequently, under a bond conditioned for the faithful performance of the duties of treasurer, the mere fact that public money is stolen from such officer without any fault or negligence on his part, does not release either him or his sureties from liability therefor.

APPEAL from a judgment of the district court of the first judicial district, Storey county, entered in favor of the plaintiff. The opinion states the facts.

W. E. F. Deal and *Wm. Woodburn*, for the appellant.

W. H. Davenport, *attorney general*, and *J. A. Stephens*, *district attorney*, for the respondent.

HAWLEY, J. This action was brought against the county treasurer of Storey county, and the sureties upon his official bonds, to recover an amount of money admitted to be deficient in the accounts of the county treasurer. The answer alleges that the money was forcibly taken by robbers from the treasurer and carried away by irresistible force "without any fault or negligence, or want of rea-

sonable care or diligence in the preservation and care of said sum of money, so that said sum of money was entirely lost to the treasury of said county, and no part thereof has ever been recovered." The district court sustained a demurrer which was interposed to this answer, upon the ground that the facts stated did not constitute any defense to the cause of action.

Was this ruling of the court correct?

The conditions named in the official bonds " is such that if the above bounden, Dennis Nevin, shall, well and truly, and faithfully, perform and execute the duties of treasurer of the county of Storey, now required by him by law, and shall, well, truly and faithfully, execute and perform all the duties of such office of treasurer, required by any law to be enacted subsequently to the execution of this bond, then this obligation to be void and of no effect, otherwise to be and remain in full force and effect."

Appellant insists that his responsibility under this contract is simply that which the common law imposes upon a bailee for hire; that he is not in any sense an insurer of the moneys in his custody, and should not be held responsible for the money that was stolen from him, and taken by the use of irresistible force without any negligence or fault or want of care on his part.

The great weight of the authorities upon this subject are adverse to the views contended for by appellant. The general rule upon this subject is to the effect that public officers who are entrusted with public funds and required to give bonds for the faithful discharge of their official duties are not mere bailees of the money to be exonerated by the exercise of ordinary care and diligence, that their liabilitiy is fixed by their bond and that the fact that money is stolen from them without any fault or negligence upon their part does not release them from liability on their official bonds.

Recognizing the almost universality of this rule, appellant contends that the decisions against him are founded upon the peculiar wording of the bonds, or provisions of the statute, to the effect that the officer shall *safely keep* and *pay over* all moneys coming into his hands. It is true, that in U. S. v. Prescott, 3 How., 588; Com. v. Comly, 3 Pa. St., 374; State v. Harper, 6 Oh. St., 610; Inhabitants of Hancock v. Hazzard, 12 Cush., 112, and other cases, considerable stress is placed upon this language in the bond. Thus in U. S. v. Prescott, the court said: "The condition of the bond has been broken, as the defendant, Prescott, failed to pay over the money received by him, when required to do so; and the question is, whether he shall be exonerated from the condition of his bond, on the ground that the money had been stolen from him? The objection to this defense is, that it is not within the condition of the bond, and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the government; how, then, can Prescott be discharged from his bond? He knew the extent of his obligation, when he entered into it, and he has realized the fruits of this obligation by the enjoy-

ment of the office. Shall he be discharged from liability, contrary to his own express undertaking? There is no principle upon which such a defense can be sustained. The obligation to keep safely the public money is absolute, without any condition express or implied; and nothing but the payment of it, when required, can discharge the bond." But there are an equal or greater number of cases like Muzzy v. Shattuck, 1 Denio, 233; District Township v. Morton, 37 Iowa, 550; Inhabitants v. McEachron, 33 N. J. L., 340; Boyden v. U. S., 13 Wall., 17, and State *ex rel.* Mississippi Co. v. Moore, 12 Fed. Rep., 740, where the condition of the bond, like the one under consideration here, is for the faithful performance of the official duties, and the conclusions of the courts are substantially the same as announced in U. S. v. Prescott.

It is apparent that a bond requiring a faithful performance of official duty is as binding upon the principal and his sureties as if all the statutory duties of the officer were inserted in the bond.

In Indiana the statutory conditions in the bond are the same as required by the laws of this state. In Halbert v. State, *ex rel.* Com., 22 Ind., 130, the treasurer's bond was, however, conditioned not only for the faithful performance of his duties as the statute required, but also that he should "pay over all moneys according to law that might come into his hands as such treasurer." The court said: "It is objected that the latter branch of the condition was unauthorized by law, and, therefore, of no effect. But if the condition for the faithful performance of his duties includes the paying over according to law, of all moneys that might come into his hands as such treasurer, nothing is added to the legal effect of the bond by the latter branch of the condition. An examination of the various statutes bearing on the question, shows clearly enough that one of the duties of a county treasurer is to pay over according to law all moneys that come into his hands as such treasurer; hence, we shall consider the case as if the bond had been conditioned simply for the faithful performance of the duties of the office."

In Boyden v. U. S., 13 Wall., 24, the court referring to U. S. v. Prescott, said: "The condition of the receiver's bond in that case, it is true, was that the receiver should pay promptly when orders for payment should be received, while the bond in the case before us is conditioned that Boyden, the receiver, had truly executed and discharged, and should continue truly and faithfully to execute and discharge all the duties of said office according to law. But the acts of congress respecting receivers made it their duty to pay the public money received by them when ordered by the treasury department. * * * The bond, therefore, was an absolute obligation to pay the money, and differing not at all, in legal effect, from the bond in Prescott's case."

What are the duties of a county treasurer under the statutes of this state?

In addition to requiring an oath and an official bond it is, among other things, provided that the county treasurer "shall receive all

moneys due and accruing to his county, and disburse the same, in the proper orders issued and attested by the county auditor:" 2 Comp. L., 2,981.

"He shall so arrange and keep his books that the amount received and paid out * * * shall be exhibited in separate accounts, as well as the whole receipts and expenditures by one general account:" 2 Comp. L., 2,984.

"He shall at all times, keep his books and office subject to the inspection and examination of the board of county commissioners, and shall exhibit the money in his office to such board, at least once a year, and as often as such board may require:" 2 Comp. L., 2,985.

"He shall annually make complete settlements with the board of county commissioners, * * * and shall at the expiration of his term of office, deliver to his successor all public moneys, books and papers in his possession:" 2 Comp. L., 2,991.

"He shall assist the county auditor and county commissioners in counting the money in his office, so that they may determine whether the funds, securities and property of the county are all on hand:" Stat. 1881, 21.

Under these provisions, is it not manifest that it is the duty of county treasurers to safely keep the public money and pay it out only as provided by law? The fact that the county treasurer is required "to receive money, and enter it in his cash book, implies, without any other special regulation, that he is to keep it, and being required to keep it, it follows that he is to keep it safely. This is one of the duties of his office he has undertaken faithfully to discharge:" Thompson v. Trustees, 30 Ill., 101.

Unless he safely keeps it, he could not exhibit it to the commissioners, as required by law, and it could not be counted. Neither could he deliver it to his successor in office. The duty to safely keep the money is made absolutely clear by the provisions of the statute already quoted and referred to. But there are also other provisions which are equally as strong and cogent. If any officer *charged* with the *safe keeping* of public money converts the same to his own use, or loans any portion of such money, he shall be guilty of embezzlement: Stat. 1881, 82; stat. 1883, 96.

Could a county treasurer, who converts the money to his own use, claim that he is not an officer who is charged with the safe keeping of the public money? It would be a stigma upon the law and a disgrace to the judiciary to say that he could successfully maintain such a defense. The statutes of this state, in relation to the duties of county treasurers, are almost identical with those of Indiana.

The supreme court of that state, in Halbert v. State, *supra*, after quoting the statutory provisions, said: "By these various provisions, it is clearly seen that it is the duty of a county treasurer to pay over the funds in his hands according to law, which may be upon orders drawn upon him by the auditor, or to his successor in office, and a failure to make such payment constitutes a breach in his bond,

conditioned for the faithful performance of his duties," and declare that the fact that the money was stolen from the treasurer without his fault did not "relieve him from the necessity of discharging the obligation imposed upon him by his bond." This decision was followed in the subsequent cases of Morbeck v. State, 28 Ind., 86; Rock v. Springer, 36 Ind., 348; and Linville v. Leininger, 72 Ind., 494.

In Iowa, where the statute is not as strong as in this state, the same doctrine is held and applied to an officer upon a bond conditioned for the performance of his duties "to the best of his ability;" District Township v. Smith, 39 Iowa, 9.

The statutes of this state are more stringent than the statute of Ohio, except in relation to the conditions of the bond. In State v. Harper, 6 Ohio St., 610, the court said: "By accepting the office, the treasurer assumes upon himself the duty of receiving and safely keeping the public money, and of paying it out according to law. His bond is a contract that he will not fail, upon any account, to do those acts. It is, in effect, an insurance against the delinquencies of himself, and against the faults and wrongs of others in regard to the trust placed in his hands. He voluntarily takes upon himself the risks incident to the office and to the custody and disbursement of the money. Hence it is not a sufficient answer when sued for a balance found to have passed into his hands, to say that it was stolen from him; for even if the larceny of the money be shown to be without his fault, still, by the terms of the law and of his contract, he is bound to make good any deficiency which may occur in the funds which came under his charge."

We deem it unnecessary, upon this branch of the case, to specially refer to the numerous other authorities where the same doctrines are announced, as it is absolutely clear, from those already cited, that the distinction sought to be maintained by appellant that the conditions of the bond and the provisions of the statute of this state should be construed differently from the construction given in the decided cases, cannot be maintained.

In many of the cases, the courts have given an additional reason for their conclusions that a public officer cannot set up the defense of a robbery of the public funds in his possession. Thus, in U. S. v. Prescott, *supra*, Justice McLean, in delivering the opinion of the court, said: "The liability of the defendant Prescott, arises out of his official bond, and principles founded upon public policy." After discussing Prescott's liability upon the bond he adds: "Public policy requires that every depository of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that he should keep safely the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depository would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our post-

masters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public?"

In Com. v. Comly, *supra*, C. J. Gibson, in delivering the opinion of the court, said: "The opinion of the court in the case of the U. S. v. Prescott is founded on sound policy and sound law. * * * The keepers of the public moneys, or their sponsors, are to be held strictly to the contract, for if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant." To the same effect are the decisions in District Township v. Morton, 37 Iowa, 553; U. S. v. Watts, 1 New Mex., 562; Commissioners of Jefferson County v. Lineberger, 3 Mon., 241.

The only defenses recognized by any of the authorities in the United States at the present time, with the exception of Cumberland County v. Pennell, 69 Me., 357, for the failure of a public officer charged with the safekeeping of the public funds to pay over the same, is where he is prevented from doing so by the act of God or the public enemy, without any neglect or fault on his part. We say the Maine case stands alone in its opposition to what it is pleased to term the new-born policy of the law. In that case, some reliance seems to have been placed upon the case of Albany v. Dorr, 25 Wend., 438; but the principles of that case were repudiated in Muzzy v. Shattuck, *supra*, and hence we are authorized to say that the case in Maine is unsustained by any other recognized authority in any of the courts of the United States, federal or state.

In U. S. v. Thomas, 15 Wall., 341, it was held that the act of a public enemy in forcibly seizing or destroying property in the hands of a public officer, against his will, and without his fault, is a discharge of his obligation to keep such property safely, and of his official bond, given to secure the faithful performance of that duty, and to have the property forthcoming when required.

Bradley, J., in delivering the opinion of the court, questions the correctness of some of the extreme views stated in some of the authorities referred to, and claims that broader language was used than was necessary where the defense set up was that the money was stolen, and says that "a much more limited responsibility" than was indicated in the language in Prescott's case "would have sufficed to render that defense nugatory." But there is no declaration of any legal principle contained in this opinion that would justify a court in permitting such a defense as was sought to be interposed in this case. It is said that public officers are bailees, "but they are special bailees, subject to special obligations. It is evident that the ordinary laws of bailment cannot be invoked to determine the degree of their responsibility."

In U. S. v. Humason, 6 Saw., 201, the court permitted the defense that the officer with the money was on a steamship which was lost at sea, and the officer drowned and the money lost in the Pacific ocean. The doctrines announced in that case are similar to the case

of U. S. v. Thomas, and do not, in any manner, militate against the general views we have expressed.

In State *ex rel.* Mississippi Co. v. Moore, the defendant, who was county treasurer, answered that he ought not to be held upon his bond because Mississippi county "being overrun with tramps, thieves, robbers, public enemies, the money could not be safely kept in said county," and that for the purpose of keeping it safely, he deposited to his credit, as treasurer, in a bank in St. Louis, which failed, whereby the money was wholly lost. The court said: "Such an answer as this, we think, is insufficient to shield defendant from liability in any view which can be taken of the case. If the obligation assumed by defendant in his bond to deliver over to his successor in office all money belonging to the county, can only be met or discharged by making such delivery or payment, it is clear that the facts set up in the answer, and admitted to be true, constitute no defense. That the above rule is a correct one, governing in such cases, is established by the following authorities:" Citing State v. Powell, 67 Mo., 395, and the various decisions of the supreme court of the United States. "If on the other hand, under the rule laid down in the case of U. S. v. Thomas, 15 Wall., 337, defendant is to be regarded as a bailee and exempt from liability to pay when the loss is occasioned by the act of God or a public enemy, he would still be liable, under the facts stated in the answer, because they show that the loss was not occasioned in either of these ways. The tramps, thieves and robbers which it is alleged overrun Mississippi county, while they are enemies to the peace and safety of the public and social order, they are not public enemies in the legal sense of these words. By enemies, is to be understood public enemies, with whom the nation is itself at open war; and not merely robbers, thieves and other private depredators, however much they may be deemed, in a moral sense, at war, with society. Losses, therefore, which are occasioned by robbery on the highway or by depredations of mobs, rioters, insurgents and other felons, are not deemed losses by enemies within the meaning of the exception:" 12 Fed. Rep., 790.

The action of the district court in sustaining the demurrer to the answer was correct.

The other positions taken by appellant relative to the time when the cause of action could be commenced, are wholly untenable. Having admitted the defalcation and claimed the right to interpose the defense inserted in his answer, the state was not compelled to wait until the close of the appellant's term of office before commencing an action upon his bond.

The judgment of the district court is affirmed.

SUPREME COURT OF UTAH.

EX PARTE LOWRIE.

Filed July 10, 1885.

CRIMINAL LAW—TRIAL—POSTPONEMENT—DISCHARGE OF DEFENDANT.—Under section 465 of the criminal procedure act, a defendant, whose trial has not been had at the next term, of the court in which the indictment is triable after it is found, is not entitled, as of right, to be discharged from custody upon his own recognizance. The discharge of the defendant, under such circumstances, rests in the sound discretion of the trial court.

PETITION for discharge on writ of *habeas corpus*. The opinion states the facts.

E. B. Critchlow, for the petitioner.

W. H. Dickson, for the people.

BOREMAN, J. It appears that on or about the fifteenth of November, 1884, the petitioner was arrested upon a criminal complaint charging him with the crime of enticing females of previous chaste character into a house of prostitution. After hearing, he was by the magistrate committed to await the action of the grand jury, and, in default of bail, was sent to jail.

By the next grand jury, on the twenty-first of February, 1885, he was indicted and warrant issued thereon. On the twenty-seventh of February he was arraigned and pleaded "not guilty," and demanded to be put immediately upon trial. The cause was continued to the fourteenth day of March following, but was not reached when the day for the trial of civil cases arrived. The civil cases occupied all the residue of the February term.

At the April term following, the trial of the case was set for the twenty-first of April. On last named day, the counsel for the people asked and obtained continuance until the twenty-ninth day of April, on account of the absence of witnesses. The cause was reached on the fourth of May, and again the counsel for the people moved for a further continuance, on the ground of the absence of witnesses. The petitioner objected, and asked that the cause be set for trial at a later date in the same (April) term. The court granted the motion of the counsel for the people.

The petitioner then asked to be discharged upon his own recognizance, but it was refused. His bail, however, was reduced to five hundred dollars. The matter now comes to this court, upon a writ of *habeas corpus*, for the discharge of the petitioner on his own undertaking of bail to appear at the next term of the third district court.

The petition alleges that certain criminal cases were tried at the February term, 1885, after his indictment; that five of the six cases tried were those where the defendants were at large on bail. At the hearing, it appeared that these cases had been called and regularly set for trial before the indictment of the petitioner had been filed. It was admitted at the hearing, also, that the prosecuting officers had been guilty of no negligence.

In order to understand fully this case, it is proper to refer to two sections of the criminal procedure act: Laws of Utah, 1878, p. 162.

"Sec. 464. The court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed in the following cases:

"1. (Has reference to failure to indict, and is not material on this point.)

"2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial at the next term of the court in which the indictment is triable, after it is found.

"Sec. 465. If the defendant is not indicted or tried, as provided in the last section, and sufficient reason therefor is shown, the court may order the action to be continued from term to term, and in the meantime may discharge the defendant from custody on his own undertaking of bail for his appearance to answer the charge at the time to which the action is continued."

The question at issue hinges upon the construction to be given to the word *may* in the latter part of said section 465, the petitioner claiming that it should be construed *shall*, so that the section should read, "and in the meantime *shall* discharge the defendant," etc.

The supreme court of the United States states the rule in cases of this character to be that where power is given to public officers—in language something of the same kind as this—the language used, though permissive in form, is, in fact, peremptory whenever the public interests or individual rights require its exercise: 4 Wall., 446.

Our attention has not been called to any public interest or sound public policy that would justify the court in allowing the petitioner to go out upon his own recognizance. Nor can we see wherein the petitioner's individual rights have been trenched upon. True, it is extremely grievous to remain in jail during these several months awaiting trial, but it is a necessity that the best interests of the public require.

There is no pretence that the action of the court was in any way arbitrary or oppressive. The counsel for the people are not shown to have acted otherwise than with diligence and for the best interests of the public. There has been no unnecessary delay. The crowded condition of the court calendar, no doubt, accounts in some measure for the delay, but even without this consideration, we do not think the postponement was unreasonable. There is no claim that the court was not authorized, from the showing made, to grant the continuance: *Ex parte* Larkin, 11 Nev., 90.

If the construction contended for by the petitioner be adopted, the result would be that in every case (excepting in capital cases where the proof of guilt is evident or the presumption thereof great), no matter how grave the charge nor how plain and urgent the grounds for postponement, yet if the court should continue the cause, on the application of the counsel for the people, beyond the term following that in which the indictment was found, the defendant

would be entitled to discharge upon his own undertaking of bail. This would, in very many cases, be equivalent to a dismissal of the action. We do not think that we are warranted in placing such a construction upon the statute, when the plain reading is to the contrary, and the evident intent of the legislature was to the contrary. The purpose of the statute, no doubt, was to give the court express authority to discharge a defendant upon his own recognizance, if, in the exercise of a wise discretion, it was deemed proper.

We are requested, however, that, in case we hold that the language leaves the discharge discretionary with the court, we should exercise that discretion and grant the petitioner a discharge upon his own undertaking of bail. The district court, which was more familiar with the case than this court, declined so to do. No new light has been given us to guide us to a different conclusion.

The discharge of the petitioner is denied, and he is remanded to the custody of the marshal.

ZANE, C. J., and POWERS, A. J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 20,046.

PEOPLE v. VIERRA.

Department Two. Filed July 28, 1885.

CRIMINAL LAW—FILING INFORMATION—WHAT OFFENSE MAY BE CHARGED.—Under section 809 of the penal code, the district attorney is authorized to proceed against the defendant for the offense disclosed in the depositions taken on the preliminary examination before the committing magistrate, and is not confined to the offense designated by name, or even generally, by such magistrate in his indorsement made on the depositions. Thus, if such depositions disclose a case of murder, an information charging the defendant with such offense may be filed against him, although, by indorsement on the depositions, the committing magistrate order him to be held for manslaughter.

APPEAL from a judgment of the superior court of Fresno county, entered upon a verdict convicting the defendant. The opinion states the facts.

Tupper & Tupper, for the appellant.

E. C. Marshall, attorney general, for the respondent.

THORNTON, J. The defendant was accused by information of murder, and was convicted of manslaughter. On his arraignment his counsel moved the court to set aside the information, on the ground, that the commitment holding defendant to answer in the complaint filed in the committing magistrate's court, ordered that the defendant be held to answer for the crime of manslaughter and the information filed against him accuses him of murder. The defendant further moved that the district attorney be directed to file an information against defendant for manslaughter.

In support of this motion, counsel for defendant read the com-

plaint filed with the magistrate which charged the defendant with murder, and also read the commitment and order of the magistrate indorsed on the complaint, which is in these words: "It appearing to me that the offense of manslaughter has been committed, and that there is sufficient cause to believe that Jose F. Vierra, the defendant, guilty thereof, that the said defendant did willfully, unlawfully, and feloniously cut and stab about the abdomen, one Manuel Maria, with a certain dirk knife about the abdomen, a human being, from the effects of said, the said named, the said Manuel Maria soon after died, I order that the said Jose F. Vierra, be held to answer to the same and committed to the sheriff of the county of Fresno, and that he be admitted to bail in the sum of three thousand dollars, and is committed to the sheriff of the county of Fresno until he give such bail."

The court denied the motion and defendant excepted.

The proceeding by information for a capital offense is one which has come into use under the present constitution adopted in 1879: Const., art. i., section 8. Under the former constitution, an indictment was required: Const. of 1849, art. i., section 8. The section of the present constitution, authorizing the proceeding by information, is as follows: "Section 8. Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county."

The defendant, on his arrest, must be taken before a magistrate: Pen. code, secs. 821, 822; who must proceed to examine the case: Pen. code, secs. 858, 859, 860. The testimony of each witness, in cases of homicide, must be reduced to writing, as a deposition, by the magistrate or under his direction: Pen. code, sec. 869. The testimony must be authenticated in the mode set forth in the section last cited, and the depositions must be returned to the clerk of the court at which the defendant is required to appear, together with the warrant, undertakings of bail, etc.: Pen. code, secs. 869, 883.

It is provided by section 872 of same code, that when it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the depositions an order signed by him, to the following effect: "It appearing to me that the offense in the within depositions mentioned, or any offense, according to the fact, stating generally the nature thereof, has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer to the same, and be committed to the sheriff of the county of ——— ."

It is further provided, sec. 809, pen. code, that "when a defendant has been examined and committed, as provided in sec. 872, of this code, it shall be the duty of the district attorney, within thirty days thereafter, to file in the superior court of the county in which

the offense is triable, an information charging the defendant with such offense."

The contention of defendant here is that the offense with which the defendant must be charged by the information to be filed, is the offense designated by name by the committing magistrate in the indorsement on the depositions, required to be made by section 872 of the penal code, and not the offense disclosed by the depositions. We use the expression "disclosed by the depositions," for that, in our opinion, is the signification of the words, "in the depositions mentioned," used in section 872. The offense by name need not be nor is it usually mentioned or designated *by name* in the depositions. The facts showing the nature and degree of the offense appear therein. Must the district attorney act on the facts as appearing in the depositions, or must he take the judgment of the committing magistrate thereon as shown by the name by which he shall designate the offense in his indorsement? The committing magistrate is usually a justice of the peace, either unlearned in the criminal law, or acquainted with it to a limited extent. It would be a strange requirement which permitted the justice to determine the offense for which the defendant should be prosecuted, instead of the district attorney, who is selected on account of his learning in the law, and especially charged with duties requiring an acquaintance with the criminal law. In England where prosecutions were allowed by information they were made by the attorney general or by the solicitor general, when the office of attorney general was vacant, or by the king's coroner or attorney in the king's bench. The officers first named acted on their own official discretion without the interference of the court and without previous examination: Bishop's Cr. Pro., sec. 143, and Black's Com., 308. Such proceeding was only allowed in England in cases of misdemeanor, except misprision of treason, and was not permissible in any felony. But the higher the nature of the offense, it is clear, that for the protection of defendant, as well as of the state, that the duty should be vested upon the officer acquainted with the law concerning crimes and offenses.

It may be conceded that the power to designate the offense for which the defendant is to be put upon his trial might be vested by the legislature in the committing magistrate, but the statute must be expressed in other terms than those in which we find them in the code to justify this court in coming to such a conclusion.

In our opinion, section 809 refers to the offense shown by the testimony disclosed in the depositions taken on the preliminary examination before the committing magistrate, and not to the offense designated by name, or even generally, by such magistrate in his indorsement made on the depositions. It will be observed that the offense is to be designated *according to the fact*. Where is the fact to be found? Manifestly in the testimony contained in the depositions. If the justice named an offense which the testimony had no tendency to show had been committed, must the district attorney still charge such offense in the information? Clearly not. The

district attorney is to act on the depositions, and to prefer the information charging the offense which the facts disclosed in such depositions show, or tend to show, has been committed by the defendant. For this purpose, among others, the depositions are required to be returned to the court at which the defendant is to appear. The provision in the constitution requiring an examination and commitment is to secure persons accused of crime from being proceeded against until there has been a preliminary trial before some judicial officer to determine whether there is a reasonable or probable cause for putting the defendant on his trial. When this is done, and the defendant is held to answer, the constitutional requirement has been complied with. The responsibility is then thrown on the district attorney to determine, from the testimony above referred to, the offense to be charged in the information. We see no reasonable objection to this view. We think it correct, and by it no right of the accused party is impaired, and there is no obstacle to a fair trial of the defendant for the offense charged. We are of opinion that the court below did not err in refusing to set aside the information herein: People v. Lee Ah Chuck, 6 W. C. Rep., 360. The instruction to which our attention is directed is not obnoxious to the objection that it could under no circumstances be correct.

We find no error in the record, and the judgment and order are affirmed.

MYRICK, J., and SHARPSTEIN, J., concurred.

No. 20,085.

PEOPLE *v.* MASON.

Department Two. Filed July 23, 1885.

CRIMINAL LAW—BURGLARY—PETIT LARCENY—PRIOR CONVICTION.—The defendant was accused, by information, of the crime of burglary, and was convicted of burglary in the first degree, and sentenced to fifteen years imprisonment in the state prison. The information contained a charge that the defendant had been previously convicted of petit larceny. On the trial the defendant pleaded guilty of such charge, and no evidence was introduced to prove the same, nor any verdict rendered thereon. *Held*, that upon the conviction for burglary in the first degree, the defendant might have been sentenced to fifteen years in the state prison independent of the former conviction for petit larceny; that the proceedings, as to petit larceny, may be disregarded, and the judgment stand. People v. King, 12 Pac. Coast Law Jour., 322, distinguished.

APPEAL from a judgment of the superior court of San Diego county, entered upon a verdict convicting the defendant of burglary. The opinion states the facts.

Leach & Parker, for the appellant.

E. C. Marshall, attorney general, for the respondent.

MYRICK, J. The defendant was accused, by information, of the crime of burglary, and was convicted of burglary in the first degree,

and sentenced to fifteen years' imprisonment in the state prison. The information contained a charge that the defendant had been previously convicted of petit larceny. One point only is presented on this appeal, viz.: The defendant, being charged with having suffered the previous conviction of petit larceny, was allowed to admit and plead guilty to that charge, and no evidence was introduced to prove the same, nor any verdict rendered thereon. The defendant refers to the decision of this court, in People v. King, 12 Pac. Coast L. J., 322, as authority that the proceedings in this case show error. The difference in the two cases is this: In People v. King, the defendant was accused of the crime of petit larceny, and a former conviction of felony, in which case the conviction for petit larceny would not justify imprisonment in the state prison, unless the proceedings as to the former conviction were regular; while in the case before us, upon conviction for burglary in the first degree, the defendant might have been sentenced to fifteen years in the state prison, independent of the former conviction for petit larceny. The proceedings in this case as to petit larceny may be laid aside and the judgment stand, no error appearing.

Judgment affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred.

No. 20,060.

PEOPLE v. BEZY.

Department Two. Filed July 28, 1885.

CRIMINAL LAW—THREATS AGAINST BROTHER OF DECEASED—EVIDENCE OF INADMISSIBLE.—In a prosecution for murder evidence of threats made by the defendant against the brother of the deceased, in the absence of any evidence connecting such threats with the injury inflicted on the deceased, is inadmissible.

THE SAME—EVIDENCE AS TO CHARACTER OF DECEASED FOR PEACE.—On a trial for murder the prosecution cannot give evidence as to the character of the deceased for peace and quietness.

THE SAME—OPENING STATEMENT FOR DEFENDANT.—It is within the discretion of the court, on such trial, to restrict the counsel for the defendant, in his opening statement, to stating what he expects to prove, without any argument upon such facts.

APPEAL from a judgment of the superior court of Fresno county, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

W. D. Tupper, for the appellant.

E. C. Marshall, attorney general, for the respondent.

THORNTON, J. The defendant was accused of the murder of John Mengetti, and on his trial the court admitted evidence, against objection, of certain threats made against Joe Mengetti. Joe Mengetti was the brother of the deceased, and the evidence shows that they lived together and were cousins and neighbors of defendant. While threats against the deceased are admissible in evidence to

show malice, threats against another person are only admitted under circumstances which show some connection with the injury inflicted on the deceased. We are of opinion that the circumstances under which the threats were made are not sufficient to show such connection as justified the admission of the evidence. It may be said that the evidence was admissible as to the general character of defendant for peace and quietness, but evidence of particular facts is not admissible on such issue. We think the court fell into an error in admitting the evidence above referred to, and it is not clear that this testimony did not operate prejudicially to the defendant. We are of opinion that it must cause the reversal of the judgment and the order denying the motion for a new trial.

There was also evidence of threats in Julius Hedrick's testimony against the Mengettis, which we think was admissible.

The court erred in permitting the prosecution to give evidence as to the character of the deceased for peace and quietness: People v. Anderson, 39 Cal., 704.

The court committed no error or abuse of discretion in restricting counsel for defendant in his opening statement to stating what he expected to prove, without any argument upon such facts: People v. Anderson, 144 Cal., 65. The counsel had abundant opportunity in the course of the trial in suggesting and arguing all points of law pertinent to the cause.

For the errors above pointed out, the judgment and order should be reversed and the cause remanded for new trial, and it is ordered accordingly.

MYRICK, J., and SHARPSTEIN, J., concurred.

No. 9,552.

FISHER *v.* SWEET.

Department Two. Filed July 28, 1885.

PARTNERSHIP—ACTION BETWEEN PARTNERS—ACCOUNTING.—One partner cannot sue his copartner, in an action at law, to recover his proportion of the partnership adventures, until there has been an accounting between them.

THE SAME—EVIDENCE OF PARTNERSHIP DISBURSEMENTS.—In an action at law or in equity, if plaintiff offer evidence tending to show that defendant had received moneys growing out of their adventures (whether as joint owners or as copartners), the defendant is entitled to show that such moneys had been disbursed in the due course of the business; and that, whether the disbursements had been made by the defendant in person, or by a mercantile firm of which he was a member.

APPEAL from a judgment of the superior court of Tulare county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Brown & Daggett and *Atwell & Bradley* for the appellant.

Bennett & Wigginton and *T. M. McNamara*, for the respondent.

MYRICK, J. The rulings in this case appear to have been consistent with the theory of the case adopted by the court; but we think

that theory incorrect. The complaint is for money had and received and for services; the plaintiff averring that he and defendant were the owners of certain lands, and that said lands were farmed and ultimately sold, and defendant, having received the proceeds thereof, and the proceeds of certain individual property of plaintiff, had failed to pay to the plaintiff his proportion, as well as compensation for his services in and about the farming of the lands. The defendant, after denying the receipt by him of the proceeds of sales, averred a partnership between himself and plaintiff, and that all the transactions concerning the said lands and the crops thereof were partnership transactions, and that there had been no final settlement of such partnership affairs.

We are of opinion that the plaintiff's evidence shows the existence of a partnership between plaintiff and defendant as to the lands purchased by them and as to farming the same, and that plaintiff cannot recover in an action at law, at least until the accounts have been settled.

We are also of opinion that in an action at law or in equity, if plaintiff offered evidence tending to show that defendant had received moneys growing out of their adventures (whether as joint owners or as copartners), the defendant would be entitled to show that such moneys had been disbursed in the due course of the business; and that, whether the disbursement had been by the defendant in person or by the mercantile firm of which he was a member.

It is not necessary to point out each particular ruling, and show its error; it is sufficient to say that the case was tried upon a wrong theory. There should have been an accounting between the parties. It was not necessary to have made the members of the firm of Sweet & Co., parties to this action; they had no interest in the partnership affairs, as such; they were, as to plaintiff and defendant, merely factors, agents, account-keepers. Payments made by Sweet & Co., in and about the business of plaintiff and defendant, as such factors and agents, should certainly be taken into account in adjusting the affairs of plaintiff and defendant. How else could equity—even common justice—be done between them?

In the action before us, the only recovery which could be had by plaintiff would be of moneys received by defendant as proceeds of the individual property of plaintiff; and as to such moneys, the court erred in not permitting defendant to show the direction in which those moneys had been disbursed.

Judgment and order reversed and cause remanded.

THORNTON, J., and SHARPSTEIN, J., concurred.

No. 9,702.

CREIGHTON *v.* KAWEAH CANAL AND IRRIGATION CO.

Department Two. Filed July 28, 1885.

DIVERSION OF WATER, WHEN RESTRAINED—NATURAL CHANNEL.—An owner of land located on a water course is not entitled to have the diversion of water therefrom restrained, unless such diversion diminishes the quantity which would otherwise have flowed therein by a natural channel.

APPEAL from a judgment of the superior court of Tulare county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

Brown & Daggett, for the appellant.

Atwell & Bradley, for the respondent.

MYRICK, J. Action to restrain the diversion of water. The plaintiff is the owner of land located on a water course called Bates' slough. The defendant uses a portion of the channel of Deep creek (another water course) as a portion of its ditch, and placed a dam across Deep creek, at a point where, it is claimed by plaintiff, the waters thereof would flow into Bates' slough, and by means of such dam caused the waters to be turned into its ditch, thus preventing the water from flowing into Bates' slough. We are not agreed upon the proposition that the evidence shows the existence of a natural water course from Deep creek to Bates' slough; nor are we agreed that the findings establish the existence of such natural water course. There is no doubt that a channel now exists, and has existed, there since the digging of the reclamation ditch, about 1870; but the doubt relates to the existence of a well-defined natural water course prior to the digging of the reclamation ditch. We are, however, agreed upon a proposition on which the judgment will have to be reversed. The defendant was restrained from "maintaining or keeping any dam in the cut or channel leading from Deep creek into Bates' slough, or in Deep creek, or in any manner interfering with or obstructing the free flow of the waters in said Deep creek, or in said cut or channel, or into said Bates' slough, or diverting any water from either of the same."

There is no evidence to show a *continuous* flow of water in a natural channel from Deep creek to Bates' slough. The most the evidence tends to show is that at high water, during spring freshets, in some years, water flowed in a depression to Bates' slough. At best, the plaintiff would be entitled only to have the defendant enjoined from obstructing the flow of that which would have *naturally* flowed, unaided by artificial means with which he, the plaintiff, is not connected. If there was a natural water course from Deep creek to Bates' slough, through which water flowed, say for two months in the year, and say to the amount of one hundred inches, and if the defendant uses the channel of Deep creek as a portion of its ditch, it will not be restrained from taking its water out of the channel of Deep creek, unless such taking out diminishes the *quan-*

tity which would otherwise have flowed by a *natural channel* into Bates' slough, and shortens the period of the natural flow; and it will be restrained only as to such quantity and period.

Judgment and order reversed, and cause remanded for a new trial.

THORNTON, J., and SHARPSTEIN, J., concurred.

No. 9,729.

FLEMING v. ALBECK.

Department Two. Filed July 28, 1885.

DEMURRER—CAUSE OF ACTION—COMPLAINT.—A general demurrer, addressed to the whole complaint, in a portion of which a cause of action is stated, should be overruled.

SPECIFICATIONS OF ERROR, HOW MADE—EVIDENCE.—Specifications of errors, in regard to the admission or rejection of evidence, should refer to the testimony as it appears in the transcript, in such a manner that the court may identify the exception reserved. Otherwise they will be disregarded.

LIBEL—DAMAGES A QUESTION FOR JURY—EVIDENCE.—In an action for libel, when no special damages are alleged, a witness cannot testify as to what, in his opinion, would be a fair amount of money, in compensation for plaintiff's damages. In such case the amount of damages is for the jury.

APPEAL from a judgment of the superior court of Merced county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Ostrander & Knox, for the appellant.

Bennett & Wiggington, for the respondent.

MYRICK, J. Action for libel. The alleged libel consists in the publication of a card in which the plaintiff was charged with having accused the defendant of setting fire to his, the defendant's, building. The card also contained a letter; at the foot of the letter occurs the following: "I wonder if the under sheriff, C. E. Fleming, has caused some one to send the above epistle to me?"

The complaint was demurred to, which demurrer was overruled. This ruling was correct, because the demurrer was general, addressed to the whole complaint; and as in a portion of the complaint a cause of action was stated, a general demurrer was properly overruled.

Many erroneous rulings in regard to evidence appear in the transcript which cannot be ground for reversal, for the reason that the statement does not comply with the statute, as to the specification of errors. We quote one specification, as a sample of many others: "The court erred in overruling defendant's objection to question put by plaintiff's counsel to witness H. W. French, marked in the foregoing statement exception No. 1, and found in lines 10 and 23, page 10." Three other specifications, in similar language, the exceptions numbered 2, 3 and 4, respectively, refer to the same witness, and a page and line are stated as to each. On looking through the transcript we find no exception numbered or marked, and at the

pages indicated we find nothing relating to the points endeavored to be presented. In only one instance out of ten does the specification tend to point out the error, and that is in reference to the witness, Howell, and because but one exception appears in connection with his examination. For that reason we can notice that exception, although the place where found is not correctly given, and it is not numbered. The witness was asked what, in his opinion, would be the fair amount of money in compensation for plaintiff's damages? This was error. No special damage was averred in the complaint, nor cause for special damage stated; therefore, the jury, and not the witness, was to say what damage had been sustained.

As the case goes back for a new trial, we will say that the letter contained in the card as published is not libelous without an *innuendo*, and should have been distinguished from that part of the card which was libelous.

Judgment and order reversed and cause remanded for a new trial.

THORNTON, J., and SHARPSTEIN, J., concurred.

No. 9,984.

SHARON *v.* SHARON.

In Bank. Filed July 29, 1885.

DIVORCE—CASE IN EQUITY—ALIMONY—APPEAL—REHEARING.—On a petition for rehearing, the rulings that an action for divorce is a case in equity, and that an appeal lies to the supreme court from the judgment of the superior court granting a divorce; and that an order made *pendente lite* by the superior court, directing the payment of alimony, is also appealable, affirmed, and a rehearing, as to such points, denied. A rehearing, however, granted on the question as to the character of bond necessary to stay proceedings upon the order for the payment of alimony.

PETITION for a rehearing. The facts appear in the prior opinion reported 6 West Coast Rep., 856.

W. H. L. Barnes, O. P. Evans and *Stewart & Herrin*, for the appellant.

Tyler & Tyler, D. S. Terry, George Flournoy, and *Walter Levy*, for the respondent.

ROSS, J. In the opinion recently delivered in this case we held, first, that an action for divorce is a case in equity, and that an appeal lies to the supreme court from the judgment of the superior court granting a divorce, and, second, that an order made *pendente lite* by the superior court directing the payment of alimony, is also appealable. In the petitions for rehearing on file it is said by counsel for the plaintiff, that, in holding that the order for the payment of alimony is appealable, we have decided exactly contrary to several former decisions of this court: Church v. Church, No. 9,405; MacNevin v. MacNevin, 63 Cal., 186; *Ex parte* Cottrell, 59 Cal., 417; and *Ex parte* Perkins, 18 Cal., 60, are the cases in which it is said

by counsel that an opposite conclusion was announced. In Church v. Church no order *pendente lite* for the payment of alimony was made by the superior court. The question as to whether such an order was or was not appealable, could not, therefore, by any possibility, have arisen in the case. The trial court there granted the plaintiff a divorce, and, in its decree granting the divorce, awarded the plaintiff permanent alimony and a certain stated sum for fees of counsel. From that decree the defendant gave notice of appeal to this court, and, within statutory time, executed an undertaking, pursuant to section 941 of the code of civil procedure, in the sum of three hundred dollars. There can be no sort of doubt that the notice and undertaking thus given perfected the appeal to this court from the final judgment of the superior court. The only question in Church v. Church was as to a stay of proceedings upon the judgment. The only undertaking given by the appellant was the one in the sum of three hundred dollars for the payment of such costs and damages as might be awarded on the appeal, but the appellant subsequently applied to the superior court to fix the amount of an undertaking to be given by him for the purpose of staying all proceedings on the judgment, and the application being denied by the superior court, a similar application was made here and denied—no opinion being delivered. This was the case of Church v. Church, and all of it, which is cited and deliberately stated by counsel for the plaintiff in the present case to have decided that there was no appeal from an intermediate order in an action of divorce directing the payment of alimony. No argument can make plainer the fact that no such question was, or could have been, involved in Church v. Church. And so with respect to the other cases cited by counsel for plaintiff. A bare statement of the facts will clearly show that in none of them has this court ever decided contrary to what we have held in the present case. In MacNevin v. MacNevin, 63 Cal., 186, which was an action for divorce, the district court had, pending the action, made orders from time to time directing the defendant to pay certain sums as alimony, which orders, though enforceable by executions, were, in fact, never enforced. The court, after trial, ordered "that plaintiff's prayer for divorce be denied, and that defendant have judgment for costs." After the making of this order, on motion of defendant's counsel, all the orders formerly made granting to the plaintiff alimony were vacated, and from this last order the plaintiff appealed as from an order made after final judgment. But the court held that the record only showed an *order* for judgment, and, therefore, that the order setting aside the orders granting alimony was not an order made after final judgment, and, consequently, not appealable.

In *Ex parte* Cottrell, 59 Cal., 419, this court distinctly said: "Whether any undertaking could be given which would operate as a stay of the execution of the order, for the payment of alimony, pending the appeal, or *whether any appeal lies from such an order, are questions which do not necessarily arise in this case, and we therefore*

express no opinion upon them." Yet counsel for the plaintiff here says that in *Ex parte* Cottrell we decided that no appeal lay from an order directing the payment of alimony. *Ex parte* Perkins, 18 Cal., 60, is the only other case in which it is said by plaintiff's counsel that this court has held that there was no appeal from an order granting alimony. In that case Perkins was, by an order of the court, directed to pay a sum of money for expenses incurred by his wife in the action for divorce, and having refused to do so, was imprisoned, and sought to be discharged from imprisonment on *habeas corpus*, upon the ground that the sum adjudged against him was a debt within the meaning of that provision of the constitution which secured the citizen against imprisonment for debt, except for fraud. The court held, and properly held, that the amount ordered to be paid by the husband was not a debt within the meaning of the constitution; that the husband did not owe the wife any specific sum of money, but he owed a duty to her which might be enforced by order of the court, compelling him to pay her money. The question there —the case being *habeas corpus*—involved only *the power* of the court to make the order. No question of appeal was involved, nor could the regularity of the proceedings be in any way considered. There is no inconsistency between that case and our ruling in the present one. We have never said that an order for the payment of alimony was a final judgment in the sense that a judgment for the payment of money from one man to another is, but we said, as did the supreme courts of Illinois and Kentucky, in the cases cited, that it was *in the nature* of a final judgment possessing the essential elements of such judgment, and which could be enforced not only by execution against property but by imprisonment of the body of the delinquent. We repeat the fact that the question under consideration has never before been passed upon in this state, and that it is with us as the case of Blake v. Blake was with the supreme court of Illinois, one of first impression. The court there says: " The question raised is one that has never been passed upon by this court, but, upon first impression, we are of opinion the appeal will lie. It is a money decree, is for a specific sum and is payable absolutely. No execution has been as yet awarded, but the court has the undoubted authority to award an execution, or, if payment was willfully and contumaciously refused, the decree might be enforced by attachment as for contempt, or payment might be coerced by sequestration of real or personal estate. By one mode or the other, the decree could be enforced, and if the defendant has property, it could, in some way consistently with the practice in courts of chancery, be subjected to its payment. Such a decree does not seem to us to be merely interlocutory. It is more in the nature of a final decree, and if no appeal lies, this case affords an instance of a money decree against a party from which no relief can be had, no matter how unjust or oppressive. This ought not to be It is no answer to this position to say defendant can have this decree against him reviewed on appeal or error, after final decree in the original cause. Of what avail would that privilege be to him

then? The litigation might be protracted and years elapse before any final decision could be reached. In the meantime he has been imprisoned for disobedience to the decree or his property under process of law been subjected to the payment of the sum decreed. Nor does the fact an appeal is allowed impose any hardship not incident to other money decrees, from which appeals may be prosecuted. On the theory, alimony is for the immediate benefit of the wife, to enable her to prosecute or defend her suit against her husband on terms of equality, the only serious result would be to delay the litigation until the propriety of the decree for temporary alimony and solicitors' fees could be determined in the appellate court. On the contrary, if an appeal should be denied, it might subject defendant to very great hardships in many cases, as the sequel will show:" 80 Ill., 523. The allowance of alimony is largely discretionary with the trial court, and will, therefore, be interfered with by the appellate court only in cases of abuse of discretion. Ordinarily, in actions for divorce, the marriage relation is not controverted, and should frivolous appeals be taken, it will be an easy matter to impose such penalty as will put a stop to the practice. But in cases where the fact of marriage is the real issue, no alimony should of right be paid until the fact of marriage, or no marriage, is properly determined, for the obvious reason that there can be no such thing as alimony unless the relation of husband and wife in fact exist.

There is, however, some question as to the character of bond necessary to stay proceedings upon the order for the payment of alimony.

With respect to that question, and to that only, there is some inconsistency in the opinions of the court, and upon that question, and that only, we desire to hear further argument, and for that purpose and to that extent only, grant a rehearing.

THORNTON, J., MCKINSTRY, J., MORRISON, C. J., and SHARPSTEIN, J., concurred.

MYRICK, J., CONCURRING. I agree with the views presented by Ross, J., down to the reasons given for a rehearing. I am satisfied with the judgment heretofore given. I wish to add the following to what has been said in favor of the appellate jurisdiction of this court:

Independent of what has been already said, I am of opinion, that under the present constitution, there can be no question as to the appellate jurisdiction of this court in the case of an alimony order. I base this view on the terms of the constitution, viz.: Article vi., section 5: "The superior court shall have original jurisdiction *in all cases in equity*;" Article vi., section 4: "The supreme court shall have appellate jurisdiction *in all cases in equity*." Wherever and whenever a superior court has jurisdiction to take any step or proceeding, or make any order, in any case in equity, of that step, proceeding or order, the supreme court has appellate jurisdiction. The legislature may provide machinery—it may de-

clare when the appeal may be taken, as in regard to orders which involve the merits, or necessarily affect the judgment, it has done—but neither by direct action nor by omission can the appellate jurisdiction of this court be abridged; it is given by the constitution in such plain and unequivocal words that it cannot be shorn off.

If, then, an action to have the validity of an alleged marriage determined and declared, or for divorce, be a case in equity, it conclusively follows that any order, step or proceeding, which the superior court has jurisdiction to make in such action, is subject to review by this court.

By way of contrast and to show more clearly if need be, the meaning of the above quoted clauses of the constitution, I quote as to probate matters: Article vi., section 5, "the superior court shall have original jurisdiction * * * of all matters of probate:" Article vi., section 4, "the supreme court shall have appellate jurisdiction * * * in all such probate matters as may be provided by law."

In probate, appellate jurisdiction is given in such matters, only, as the legislature may provide; while in equity cases the appellate jurisdiction is as broad and extensive as is the original jurisdiction.

It has been repeatedly held that where appellate jurisdiction is given, and no machinery is prescribed, the appellate court will furnish machinery, to the end that the right of review be not lost: Houghton's Appeal, 42 Cal., 35; People v. Jordan, 4 West Coast Rep., 84.

As to whether the action now under consideration is a case in equity, has been considered in the opinion heretofore filed, and I do not deem any addition in that regard necessary or useful.

IN RE LING.

Department Two. Filed July 29, 1885.

BILL OF EXCEPTIONS—REMOVAL OF OFFICER—APPEAL.—In a proceeding, under section 772 of the penal code, for the removal of a civil officer, the action of the court can be reviewed on a transcript of the record of the case in the court below, on an appeal from the judgment of dismissal, without a bill of exceptions, when the whole case appears on the record.

APPLICATION to the supreme court to settle a bill of exceptions, in a proceeding, under section 772 of the penal code, to remove a civil officer.

W. Smith, for the petitioner.

No appearance for the respondent.

THE COURT. In this proceeding, as the whole case appears on the record, there is no bill of exceptions requisite. A bill of exceptions is only necessary to place that on the record, which, without it, does not go on the record. In this case the action of the court can be reviewed on a transcript of the record of the case in the court below on an appeal from the judgment of dismissal.

The application is denied.

No. 8,538.

ESTATE OF HILL, DECEASED.

Department One. Filed July 30, 1885.

SURETIES—PAYMENT OF DEBT OF PRINCIPAL.—Sureties who are compelled to pay a debt of their principal have a legal demand for reimbursement, which they may enforce against him by personal action if he be alive, or against his estate if he be dead. But in either case reimbursement can only be claimed for what has been expended.

THE SAME—JUDGMENT AGAINST SURETIES WHEN DEMAND AGAINST ESTATE OF PRINCIPAL.—Sureties on an official bond, against whom a judgment has been rendered for the amount of a defalcation of their principal are not creditors holding an enforceable demand against the estate of the latter until such judgment has been paid by them.

ADMINISTRATOR INTERESTED IN CLAIM CANNOT ACT ON IT.—An administrator who is personally interested in a claim against the estate of his intestate, is disqualified, under section 1,510 of the code of civil procedure, from acting upon it.

MINOR HEIRS WHEN NOT ESTOPPED TO DISPUTE ACCOUNT.—Minor heirs of a deceased intestate are not estopped from questioning the correctness of the administrator's account, by reason of proceedings in the probate court for a sale of the real property to pay the alleged claim in dispute.

APPEAL from a judgment of the superior court of Fresno county. The opinion states the facts.

H. S. Dixon and *D. S. Terry*, for the appellants.

Sayle & Harris and *Bennett & Wigginton*, for the respondents.

MCKEE, J. This is an appeal by the heirs at law and distributees of the estate of W. W. Hill, deceased, from a judgment settling and allowing the final account of the administrator of the estate, and from an order denying a new trial.

The principal question for adjudication arises out of a claim against the estate for forty thousand six hundred and twenty-seven dollars. The claim was presented to the administrator on the ninth of May, 1877, for allowance or rejection, and was allowed by the administrator and approved by the probate judge on the same day. In the course of administration payments were made upon it, from time to time, which the superior court, sitting as a court of probate, approved and credited the administrator with in the settlement of his final account. This approval and settlement it is contended, was erroneous, because the claim was one in which the administrator was personally interested, which was not chargeable against the estate, and its allowance and the payments thereon were fraudulent and void.

The basis of the claim is an official bond given by W. W. Hill in his lifetime as treasurer of Fresno county. While in office Hill died, intestate, on the third of February, 1874. After his death the county, having discovered that he was at the time of his death short in his accounts to the extent of fifty-six thousand dollars, commenced an action against the sureties upon his official bond to recover the amount of his defalcation. The action was commenced on the thirtieth of July, 1874, and on the sixth of December, 1875, judgment was entered therein against the sureties upon the bond, for the amounts of their respective obligations, for which each was adjudged liable, as follows, namely: Against A. H. Burrough, for

one thousand dollars and costs; F. B. Duff, one thousand dollars and costs; Frank Dusy, five hundred dollars and costs; William Faymonville, one thousand five hundred dollars and costs; J. C. Hoxie, two thousand dollars and costs; William Ingram, two thousand dollars and costs; E. Jacob, two thousand dollars and costs; Joseph Kincaid, five hundred dollars and costs; Alexander Kennedy, two thousand dollars and costs; J. P. Lane, one thousand dollars and costs; W. S. Powell, two thousand five hundred dollars and costs; Jonathan Rea, five thousand dollars and costs; T. W. Simpson, two thousand dollars and costs; J. G. Simpson, one thousand dollars and costs; John Sutherland, twenty thousand dollars and costs; A. H. Statham, five thousand dollars and costs, and Justin Esrey, five thousand dollars and costs. On appeal the judgment was affirmed by the supreme court and the remittitur was filed in the district court on the ninth of April, 1877.

A. H. Statham, one of the sureties upon the bond, against whom judgment was rendered for five thousand dollars and costs, was the duly qualified administrator of the estate. Notice to creditors of the estate to present their claims within ten months, as required by law, had been duly given by publication of notice, commencing on the eleventh of March, 1874, and ending on the eighth of April, 1874. No claim upon the bond against the estate was ever presented by the county. To the action commenced against the sureties on the bond, the estate was not made a party. The action was commenced and prosecuted to judgment against the sureties only; and, after the judgment was affirmed by the supreme court, three of the sureties on the bond, namely, Sutherland, Esrey and Morrow, claiming to act for themselves, and as "trustees and attorneys in fact" for the other sureties, including Statham, who was also administrator of the estate, made out and presented to the administrator a claim in substance as follows:

"Estate of W. W. Hill, deceased, Dr. to Justin Esrey, T. W. Simpson, J. C. Hoxie, Alexander Kennedy, F. B. Duff, Jonathan Rea, J. P. Lane, Frank Dusy, W. S. Powell, Wm. Ingram, J. G. Simpson, Wm. Faymonville, John Sutherland, Elias Jacob, M. J. Church, A. H. Statham, Henry Burrough, Joseph Kincaid and Jesse Morrow, forty thousand six hundred and twenty-seven dollars and twenty-seven cents, for the amount of a judgment recovered, on the sixth of December, 1875, by the county of Fresno against them as sureties upon the official bond of W. W. Hill, late treasurer of said county, for defalcation in office, and affirmed on appeal to the supreme court, the twenty-seventh day of January, 1877—the remittitur from said court being filed, in the court in which the judgment was rendered, on the ninth of April, 1877, which judgment said claimants are compelled to pay on account of the defalcation of said W. W. Hill, deceased, their principal in said bond." The claim was supported by the following affidavit:

"STATE OF CALIFORNIA, }
" County of Fresno. }

"Jesse Morrow, Justin Esery and John Sutherland, Sr., for them-

selves and as the attorneys in fact for T. W. Simpson, J. C. Hoxie, Alex. Kennedy, F. B. A. Duff, Jonathan Rea, J. P. Lane, Frank Dusy, W. S. Powell, William Ingram, J. G. Simpson, William Faymonville, Elias Jacob, M. J. Church, A. H. Statham, Henry Burrough, Joseph Kincaid, whose foregoing claim is herewith presented to A. H. Statham, the administrator of the estate of said deceased, being duly sworn, says each for himself, and not one for the other, that the amount thereof to wit: the sum of forty thousand six hundred and twenty-seven dollars and twenty-seven cents in gold coin, is justly due to said claimants. That no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of said Justin Esery, Jesse Morrow and Jonathan Sutherland. [Signed] "JESSE MORROW,
"JOHN SUTHERLAND, Sr.,
"JUSTIN ESERY.

"Subscribed to and sworn before me, this ninth day of May, A. D. 1877. [Signed] "C. G. SAYLE,
[Notarial Seal.] "Notary Public."

Thus supported, the claim was presented and indorsed as follows:

"No. 81—Probate Court, Fresno county.—In the matter of the estate of W. W. Hill, deceased—Claim of the official bondsmen of said deceased for $40,627.27—The within claim presented to A. H. Statham, administrator of said deceased, is allowed and approved for $40,627.27, this 9th day of May, 1877. [Signed] A. H. Statham, administrator.—Allowed and approved for $40,627.27 this 9th day of May, 1877. [Signed] Gillum Baley, Probate Judge. Filed 9th of May, 1877. [Signed] A. M. Clark, Probate Clerk."

The claim was therefore presented, allowed and approved as a claim due and payable by the estate to the claimants.

But the evidence proves, beyond a reasonable doubt, that the claim was not for a demand against the estate then due and payable to the claimants, and that its allowance by the administrator, as a claim of that character, was the result of a collusive understanding and arrangement between the administrator and his co-sureties, upon the bond of the intestate, to relieve himself and them from their obligations on the bond at the sacrifice of the estate.

For the uncontradicted evidence shows that when the claim was presented to the administrator the sureties had not paid the judgment. On the very day that the claim was made out they met to consider ways and means for its payment. At that meeting the district attorney of Fresno county proposed, if they would pay the costs in the case the county would extend time for payment of the judgment. That proposal was accepted, and for the purpose of acting accordingly, and also providing for the payment of the judgment, they appointed three of their number, namely, Sutherland, Esery and Morrow, to act as "trustees and attorneys in fact for them;" and, by a power of attorney which was duly executed, acknowledged and recorded, they empowered them "for us and in our

names, etc., and for our use and benefit to ask, demand, sue for, recover, etc., all such sums of money, debts, etc., as are now or shall hereafter become due * * * to us from the estate of W. W. Hill, deceased, or his heirs, or legal representatives, and have use and take all lawful ways and means in our names or otherwise for the recovery thereof by attachment, etc., or otherwise * * * and other sufficient discharges in our names to make, seal and deliver, to bargain, contract, agree for, purchase, receive and take lands, tenements, etc., and accept seizin and possession of all lands * * * and to lease * * * bargain, sell * * * convey, mortgage, etc., lands, etc. Also to bargain and agree for, buy, sell, mortgage, etc., and in every way and manner deal in and with goods, wares and merchandise, choses in action and other property in possession that may be received by them from the said estate of W. W. Hill, deceased, or his heirs or legal representatives, and to make, do and transact all and every kind of business of what nature or kind soever as they may deem beneficial to our interest in connection with our claim against the said estate of W. W. Hill, deceased, his heirs and legal representatives."

Statham, the administrator of the estate, attended the meeting, signed and acknowledged the power of attorney, and participated in the plan arranged for the payment of the costs to the district attorney, and the ultimate payment of the judgment. The result was, the "trustees and attorneys in fact of the sureties," on the same day borrowed one thousand two hundred and forty-eight dollars, which they paid to the district attorney and Statham appropriated for the same purpose two thousand dollars in his hands as administrator, which being paid over in satisfaction of the costs in the action, the claim against the estate was made out by the "trustees," and presented to the administrator, who immediately allowed and approved it. The entire basis of the claim as an absolute demand against the estate was this payment.

The appropriation by the administrator of two thousand dollars of the estate for his individual purposes, was an unauthorized and illegal act; an unauthorized appropriation of funds of an estate cannot be made the basis, in whole or in part, of a claim against the estate. The payment made by the sureties on the judgment therefore only amounted to one thousand two hundred and forty-eight dollars; and the administrator knew the fact. Being examined as a witness in his own behalf he testified: "When the claim was presented to me, I knew of no payment having been made to the county by any of the claimants except the sum of three thousand two hundred and forty-eight dollars, and two thousand dollars of that I paid out of the estate, the rest was paid by the trustees of the claimants." Yet with that knowledge and the knowledge of his own interest in the claim, he allowed the claim presented to him for forty thousand six hundred and twenty-seven dollars and twenty-seven cents, as justly due and owing by the estate to the claimants.

There is no doubt that sureties who are compelled to pay a debt

of their principal, have a legal demand for reimbursement, which they may enforce against him by personal action, if he be alive, or against his estate if he be dead. But, in either case, reimbursement can only be claimed for what has been expended: Secs. 2,847, 2,848, C. C. Here the demand did not accrue until after the death of the principal, and for any moneys paid by them the sureties had an absolute demand against the estate which they were legally entitled to enforce, according to law. But one thousand two hundred and forty-eight dollars were all that was legally paid by them, and for that sum no claim against the estate was ever presented. The unpaid judgment against them was not an absolute, provable claim against the estate; it was merely a possible or contingent claim, arising out of their adjudicated connection with the bond of the intestate, which might never become absolute; for the sureties may not have been able to pay the judgment against them, and the judgment might never have been enforced. At all events, until payment *they* had no enforceable demand against the estate for the amount of the judgment: Secs. 709 and 1,059, C. C. P.

In Pico v. De la Guerra, 18 Cal., 422, a claim against an estate was predicated upon a guaranty to indemnify a surety upon a promissory note. Before the note became due and payable, the guarantor died, and the surety, before he had paid the note, presented a claim upon the guaranty, which the executor allowed and approved; but the allowance and approval were held unauthorized and void, because, as the claim against the estate was merely contingent upon the payment by the surety of the promissory note of his principal, no cause of action accrued until the contingency happened, and no recovery could be had against the estate either by the presentation of an immature claim, or by suit at law against the estate.

So it was in the proceedings in hand. The alleged claimants were liable as debtors of Fresno county for the judgment recovered against them as sureties upon the official bond of the intestate; but they were not creditors of the estate holding an enforceable demand against it for the amount of that judgment, because they had not paid the judgment; and until payment thereof they were not entitled to proceed against the estate to enforce its payment in the course of administration. Besides, as the administrator himself was personally interested in the claim he was disqualified by law from acting upon it: Sec. 1,510, C. C. P.

The minor heirs are not estopped from questioning the correctness of the administrator's account by reason of the proceedings in the probate court for a sale of the real property to pay the alleged claim.

It results that the payments made by the administrator upon this claim and allowed him by the probate court on the settlement of his account were erroneously allowed.

Judgment and order reversed and cause remanded for further proceedings.

ROSS, J., and MCKINSTRY, J., concurred.

No. 9,701.

SCOLLAY v. COUNTY OF BUTTE.

Department One. Filed July 30, 1885.

COUNTY CANNOT DELEGATE POWER TO COMPROMISE SUIT—ULTRA VIRES.—Under sections 4,000, 4,001, 4,003 and 4,046 of the political code, the board of supervisors of a county have power to contract for the collection of the property of the county, but in the exercise of that power it has no authority to delegate to others, whom it employed for that purpose, the power to determine whether to commence a suit in the name of the county, and to select and employ attorneys to commence and prosecute such a suit; nor to abdicate its control of the prosecution of such suit, or to make its compromise or settlement dependent upon the written consent of strangers. Such powers are in the nature of public trusts conferred upon the corporation for the public benefit, and cannot be vicariously exercised. A contract attempting to delegate such powers is *ultra vires*.

APPEAL from a judgment of the superior court of Butte county, entered in favor of the defendant. The opinion states the facts.

Wm. M. Pierson and *H. C. Newhall*, for the appellant.

I. S. Belcher, *John C. Gray*, *Chas. F. Lott*, *L. C. Granger* and *A. F. Jones*, for the respondent.

MCKEE, J. In the year 1876 Butte county was the owner and holder of two hundred railroad bonds of the California Northern Railroad Company, secured by mortgage, the principal and interest of which had become due and payable; but the company would not pay and the county was desirous of collecting them. Under those circumstances, two persons—W. S. Watson and William Corcoran—proposed to the board of supervisors of the county that they would collect them, without attorney's fees, expenses or costs to the county, for fifty cents on the dollar. The board accepted the proposal, and on the third of October, 1876, a written contract to that effect was drawn and signed by the chairman of the board, in the name of the county, and by Watson and Corcoran; and the contract, thus signed, was ratified by the board.

By the terms of the contract, the bonds were to be delivered to Watson and Corcoran for collection; they were to commence, within sixty days, "proceedings," or "negotiations," or "a proper suit," for their collection, and "prosecute the matter without any unnecessary delay," without costs or charges, or attorney's fees, and when collected, retain to their own use fifty per cent of the amount collected "in full payment of themselves, their agents, attorneys and employés employed or engaged in the matter." It was also "mutually understood and agreed that either of the parties thereto may compromise the matter of paying said bonds with said railroad company, upon such terms and conditions as they may deem just and equitable, but no compromise so made shall be final or binding without the express written consent of the parties hereto."

On the second of December, 1876, foreclosure proceedings upon the bonds and mortgage were commenced against the railroad company. These were continued for about seven years without other result than the recovery of a final judgment for the principal and interest due upon the bonds, but for the execution of this judgment,

so far as it appears from the complaint, no steps were taken; and under these circumstances the board of supervisors of the county, on the fifteenth of May, 1883, compromised and settled with the railroad company, without the consent, written or otherwise, of Watson and Corcoran, and received from the company twenty thousand dollars, which it accepted in full satisfaction of the bonds and release of the mortgage. It is alleged that "when this settlement was made there was due and payable on said bonds the sum of forty-seven thousand and fifty-eight dollars and eighty cents, which could and would have been collected and received by the county, but for the unauthorized compromise and settlement by the board." Five months after this settlement, Watson and Corcoran assigned the contract to the plaintiff and appellant, who presented a claim to the board of supervisors for twenty-three thousand three hundred and twenty-nine dollars and forty cents, due upon said contract. The claim was rejected, and hence this suit. The answer of the county to the complaint is that the contract was *ultra vires*.

When the contract was made the powers of the several counties of the state, as defined by the legislature, were contained in the following sections of the political code:

"Sec. 4,000. Every county is a body politic and corporate, and as such has the powers specified in this code, or in special statutes, and such powers as are necessarily implied from those expressed.

"Sec. 4,001. Its powers can only be exercised by the board of supervisors, or by agents and officers acting under their authority or authority of law.

"Sec. 4,003. It has power:

"1. To sue and be sued.

"3. To make such contracts, and purchase and hold such personal property as may be necessary to the exercise of its powers.

"4. To make such orders for the disposition or use of property as the interests of its inhabitants require."

And the board of supervisors, as agents of the county were clothed with the following jurisdictions and powers:

"Sec. 4,046. The boards of supervisors, in their respective counties, have jurisdiction and power, under such limitations and restrictions as are prescribed by law.

"8. To purchase, receive by donation, or lease, any real or personal property, necessary for the use of the county, preserve, take care of, manage and control the same.

"10. To sell at public auction at the court house door, after thirty days' previous notice * * * to the highest bidder for cash, any property, real or personal, belonging to the county.

"15. To direct and control the prosecution and defense of all suits to which the county is a party.

"26. To do and perform all other acts and things required by law, not in this title enumerated, or which may be necessary to the

full discharge of the duties of the chief executive authority of the county government," etc., etc.

These provisions constituted the charter of the county upon the subjects to which they relate; and for the declared purposes and objects within its jurisdiction, the board could exercise the powers expressly granted to it, and those which were necessarily or fairly implied in or incident to them.

Railroad bonds belonging to a county are property, upon which the county may sue, and about which the board of supervisors may make such orders as it may deem best for the interests of the county, with reference to the use or disposition of the same, in the mode prescribed for the exercise of its powers. No orders were made for the sale of the bonds in the mode prescribed by subdivision 10 of section 4,046, *supra*. The contract was for their collection by negotiations or other proceedings, or by suit. No question is made as to the power of the county to sue. Such a power implies the power to employ an agent to commence and prosecute a suit, unless the law itself has provided for the county a law officer whose duty it is to commence and prosecute suits for the county. Such an officer has been provided in the district attorney, whose duty it is, as the legal adviser of the county * * * "to defend all suits brought against * * * his county, and prosecute * * * all actions for the recovery of debts, fines, penalties and forfeitures accruing to * * * his county"; and to collect and receipt for the same in his official capacity: Subs. 3, 4, sec. 4,256, political code.

In Hornblower v. Duden, 35 Cal., 660, it was held, upon the authority of Smith v. The Mayor of Sacramento, 13 Id., 533, that, while the power to employ other counsel than the district attorney to commence and prosecute suits for the county was not expressly conferred on the board of supervisors, it was obviously embraced in the general power to do and perform all such other acts and things as may be strictly necessary to the full discharge of the powers and jurisdiction conferred on the board and in the power to control the prosecution and defense of all suits to which the county is a party.

Accepting that as a correct rendition of the powers conferred on the board of supervisors in respect to the prosecution and defense of suits to which the county may be a party, the contract under consideration is not of that character. The plaintiff does not allege that his assignors were attorneys or counselors at law, or that they, or the board of supervisors, contracted for legal services to be rendered by them in connection with or independent of the district attorney. The subject matter of the action was the collection of *choses in action* which belonged to the county. Without obtaining any order or instructions from the board to sue, the contracting parties agreed "to commence a proper suit, or proceeding, or negotiation, for the collection of the amount due upon said bonds, within sixty days from date, and to faithfully and diligently prosecute the same until a final judgment or settlement, without any cost or charge to the county; * * * and to accept in full for all services to be

rendered by them, or attorneys *they may employ in the matter*, the sum of fifty per cent upon each and every dollar so collected by them of the amounts due upon said bonds," etc.

It may be conceded that the board of supervisors had power to contract for the collection of the property of the county; but in the exercise of that power it had no authority to delegate to others, whom it employed for that purpose, the power to determine whether to commence a suit in the name of the county and to select and employ attorneys to commence and prosecute such a suit; nor to abdicate its control of the prosecution of such a suit, or to make its compromise or settlement dependent upon the written consent of strangers. The commencement of a lawsuit, the selection and employment of attorneys to commence and prosecute it, and the compromise and settlement of the same are acts which involve the exercise of judgment and discretion; and it is well settled, that powers conferred upon a municipal corporation to do such acts can not be delegated to others. Such powers are in the nature of public trusts conferred upon the corporation for the public benefit, and can not be vicariously exercised: Cooley's Const. Lim., 204. Hence the contract in suit was *ultra vires*; and the court below sustained the demurrer.

Judgment affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

No. 8,255.

WEIHE ET AL. v. STATHAM ET AL.

Department One. Filed July 30, 1885.

FRAUDULENT SALE OF LAND BY ADMINISTRATOR—ACTION AGAINST ADMINISTRATOR FOR—DOUBLE DAMAGES.—Under section 1,572 of the code of civil procedure, an executor or administrator, as the case may be, who fraudulently sells any real estate of a decedent, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein. Such damages are not recoverable, under the section, from the sureties on the official bond of the executor or administrator.

THE SAME—ACTION ON BOND OF ADMINISTRATOR—DAMAGE.—No action can be maintained, under section 1,571 of the code of civil procedure, on the bond of an executor or administrator, to recover for his neglect or misconduct in relation to any sale of the real property of the deceased, unless it appears that the persons interested in the estate have suffered damage thereby. If it be alleged in such action that the land was sold for its full value, the presumption is that no damage was suffered, and the parties interested will be left to their remedy in the probate court.

APPEAL from a judgment of the superior court of Fresno county, entered in favor of the defendants. The opinion states the facts.

H. S. Dixon, for the appellants.

Sayle & Harris, for the respondents.

ROSS, J. The complaint, a demurrer to which was sustained by the court below, alleges, among other things, the decease of Wm. W. Hill, the appointment of an administratrix of his estate, the statutory publication of notice to creditors, the expiration of the statu-

tory time for the presentation of claims against the estate, the payment of all claims against it "except for some inconsiderable sums which may have been due for expenses of administration," the then marriage of the administratrix, which operated a revocation of her letters, the subsequent appointment of the defendant Statham as administrator, the execution of his bond as such administrator with the defendants Morrow, Sutherland and Morgan as sureties thereon, the qualification of the administrator, his subsequent entry upon the duties of the trust, and his receipt of real and personal property of the estate of large value, and then charges in substance that defendant Statham did "fraudulently sell all the real property of the decedent," in that he did on the ninth of May, 1877, enter into a fraudulent scheme and conspiracy with certain named persons, including two of the sureties on his bond as administrator, whereby those persons, through three of their number, should make, swear to and present to Statham for allowance, as administrator, a pretended claim against the estate in the sum of forty thousand six hundred and twenty-seven dollars and twenty-seven cents, in which Statham was interested to the extent of five thousand dollars, and whereby Statham, as administrator, should allow the claim in the full amount for the joint benefit of the parties interested, and that by representing to the probate judge, by affidavits, that the amount of the claim was justly due to the claimants, procured the approval thereof by the probate judge; that pursuant to such fraudulent scheme, the claim was presented to and allowed by the administrator Statham, he then "well knowing that the same and the whole thereof was then, and long prior thereto had been, barred by the statutes of limitation in such case made and provided"—and also by the judge of probate; that in further pursuance of the alleged fraudulent scheme, "and finding that proceedings previously taken by him in said probate court for, and sales by him previously made to C. G. Sayle, and William Glenn, of all of the real property of said estate, for the purposes aforesaid, were not legal, and passed no title to said parcel No. 1 (of land) especially to said agents and attorneys, who then attempted to hold such title for and on his behalf, and for said other pretended claimants," the defendant Statham, as administrator, subsequently presented to the probate court having jurisdiction of the estate, a petition praying for an order of sale of the real property of the estate, for the purpose of paying the debts of the estate and the costs and expenses of administration, and such proceedings were had thereon as that, on the twenty-fifth of February, 1878, the probate court made an order authorizing defendant Statham to sell the real property of the estate, for the purposes stated in the petition for sale; that the proceedings in relation to such sales were in accordance with the provisions of the statute regulating such matters in so far as mere procedure was concerned, but that, as a matter of fact, there were, at the time of the presentation of the petition, and at the time of the making of the order of sale, no valid debts or claims against the

estate except for expenses of administration, and that the amount of those were exaggerated in the petition; that, at the time of making the order for the sale of the real property of the estate, the probate judge required the defendant Statham, as administrator, to execute an additional bond for the faithful discharge of the duties of his trust, which he did, with the defendants Morrow, Faymonville, Esery and Goforth as his sureties thereon; that, under the order of sale and in further pursuance of the fraudulent scheme, defendant Statham, as administrator, "did, prior to the twenty-second day of March, 1878, receive a bid from said Glenn, which bid, save so far as said parcel No. 2 is concerned, was, as said defendant Statham then well knew, so made in the interest alone of himself and said other pretended claimants, and, in order to protect their title thereto, then held for them, including himself, said Statham, by their said agents and attorneys, for the whole of said real property, for and in the sum of five thousand and sixty-eight dollars for said parcel No. 1, and one thousand eight hundred and eighty dollars for said parcel No. 2; and did, on said twenty-second day of March, 1878, make and file his return of such sales to said probate court, upon which he caused to be had such legal and proper proceedings that thereafter, on the fourth day of April, 1878, he did, for the purposes and in behalf of the persons aforesaid, including himself, procure from said probate court an order that day duly made and entered confirming said sales and directing him as such administrator, to convey said lands to said Glenn, whereupon on the same day he did as such administrator, execute, acknowledge and deliver to said Glenn a conveyance of all said lands, who, upon the same day, did execute, acknowledge and deliver to said agents and attorneys, for said pretended claimants, all the lands described in said parcel No. 1, and also gave his note for one thousand eight hundred and eighty dollars, the purchase money for said parcel No. 2, and his mortgage on the lands described in said parcel No. 2, to said Statham, as such administrator, who thereupon applied the same to said pretended claim"; that the real property so sold was, at the time of sale, ever since has been, and now is, of the value of six thousand nine hundred and eighty-four dollars—the amount for which it was sold, as we understand the averment of the complaint.

The complaint contains the further averment, "that all said real property passed into the hands of innocent purchasers, for value, without notice of said frauds"; that the averments hereinbefore referred to with respect to the fraudulent practices, as to the party verifying the complaint, are made on information and belief; that the facts constituting the alleged frauds did not come to the knowledge of the plaintiffs until March 14, 1881, and "that by said unlawful and fraudulent sales of said real property, plaintiffs are, and have been, damaged in a large sum of money, to wit, thirteen thousand eight hundred and ninety-six dollars"—being double the amount of the alleged value thereof—the action being based, as said by

plaintiffs' counsel, upon section 1,572 of the code of civil procedure, which reads: "Any executor or administrator who fraudulently sells any real estate of a decedent contrary to or otherwise than under the provisions of this chapter, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein."

Counsel is mistaken in supposing that this section authorizes the recovery upon the *bond* of the administrator. The preceding one—section 1,571—provides for an action upon the bond in case of neglect or misconduct in the proceedings of the executor in relation to any sale. It reads: "If there is any neglect or misconduct in the proceedings of the executor in relation to any sale, by which any person interested in the estate suffers any damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise." And this is followed by the provisions of section 1,572 which make the *executor* or *administrator*, as the case may be, who fraudulently sells any real estate of a decedent—but not the sureties—liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein. It is evident, therefore, that section 1,572 of the code of civil procedure affords no warrant for an action upon the bond of the administrator for the recovery of double the value of the land alleged to have been fraudulently sold by the administrator. Nor does the complaint in question contain sufficient averments to entitle the plaintiffs to recover under the provisions of section 1,571, *supra*. The right there given, upon the bond, is to any person interested in the estate who "*suffers damage*." The complaint contains no averment with respect to any proceedings in the probate court having jurisdiction of the estate of the deceased Hill, subsequent to the confirmation of the sale of the land, but does show, affirmatively, that the land was sold for its full value, to wit, six thousand nine hundred and forty-eight dollars. Presumptively, of course, the probate court has required, or will require, the administrator to make proper disposition of the money. If it properly belongs to the plaintiffs in the present suit, it will doubtless go to them under the decree of the probate court. If, under the decree of distribution, they should be awarded the money realized on the sale of the land, shown by the complaint in the present action to have been its true value, they would not be pecuniarily damaged by the alleged misconduct of the administration, and cannot recover the same amount in another and independent action. In so far as the complaint here shows, the remedy of the plaintiffs is in the probate court.

Judgment affirmed.

McKINSTRY, J., and McKEE, J., concurred.

No. 8,957.

REAY v. BUTLER ET AL., AND TREADWELL, INTERVENOR.

Department One. Filed July 30, 1885.

INTERVENTION—NATURE OF—DOES NOT CHANGE CHARACTER OF ORIGINAL ACTION—EJECTMENT—JURY TRIAL.—An intervention, under section 662 of the former practice act, merely results in the addition of a new party or parties to the original action, for the purpose of hearing and determining, at the same time, all conflicting claims which may be made to the subject matter in litigation; it does not change the nature of the action itself, or stop the machinery of a trial thereof. Consequently, the plaintiff, in an action of ejectment, is entitled to a jury trial, notwithstanding an instruction, praying for equitable relief, is filed, and a denial thereof is error.

THE SAME—INTERVENTION WHEN NOT ALLOWED IN EJECTMENT.—Whether intervention is applicable at all to an action of ejectment *quaere*. But where a person does not claim to have derived title from plaintiff or defendant in the action, and does assert title in himself paramount to both plaintiff and defendant, there can be no intervention.

THE SAME—JUDGMENT MUST NOT INCLUDE MORE THAN COMPLAINT.—In such action, where the intervenor asserts a right to only part of the demanded premises, it is error for the court to adjudge him to be the absolute owner of the whole thereof, and to perpetually enjoin the plaintiff from prosecuting his action and from ever thereafter maintaining any other action for the same land.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the intervenor, and from an order denying a motion to vacate the same. The opinion states the facts.

E. A. Lawrence and *Flournoy & Mhoon*, for the appellant.

Fisher Ames and *W. C. Burnett*, for the respondent.

MCKEE, J. From a final judgment entered on the thirty-first of December, 1879, and from an order made and entered on the twenty-eighth of December, 1880, denying a motion to vacate and set aside said judgment, the appeal in this case has been taken. The judgment was rendered in a proceeding of intervention filed in an action of ejectment brought by J. W. Reay against John Butler and P. H. Owens, defendants, to recover possession of a tract of land "situate in the city and county of San Francisco, described as follows, viz.: Commencing at a point 8.04 chains south of the quarter section post in the center of section 7, township 2 south, range 5 west, thence north 22.54 chains; thence east 26.80 chains; thence running north 80¼° east 3.08 chains; thence south 24.85 chains; thence west 29.44 chains, to the place of beginning, containing 54.30 acres more or less, being the land immediately west of what is known as the Dana tract, and what was formerly the San Souci rancho, and located near the Lone Mountain cemetery and adjoining Kilians and Culvers' land."

The complaint was filed on the twentieth of February, 1866; on the second of March, 1866, the defendants appeared, by J. P. Treadwell, their attorney, and filed an answer in which they "deny each and every the allegation in the complaint contained" and aver that J. P. Treadwell was, "at and before the filing of the complaint, and still is the owner of and in the possession and occupation, and entitled to the possession of the land; and that they are in possession under and by license from him, and in sub-

ordination to his right and title, and not otherwise;" and that "said Treadwell is ready and willing to, and does, defend this action as landlord and owner of the demanded premises."

Pending the action upon the issues raised by that answer, Treadwell, the attorney of record for the defendants, upon the twenty-fifth of June, 1867, applied in proper person for, and obtained an order permitting him in his own behalf, to intervene in the action, and on the same day he filed his complaint in intervention, in which he alleged, that he was the owner and in possession of a tract of land described as "all that part of the demanded premises known as, and called Speck ranch, and otherwise as Treadwell's ranch. Said ranch is situated in the city and county of San Francisco, is within the demanded premises, and is bounded and described as follows: "Commencing at the northwest corner of the San Souci property as called for, near a shed there; thence west 7.29 chains; thence south 88° 10′ west 11.38 chains; then south 86° 30′ west 10.87 chains, on the east, south and west by a line running south from said northwest corner 17.38 chains; thence north 15° west 1.65 chains; thence to west end of the line above described as the northerly boundary line of said ranch;" that plaintiff and defendants have confederated "to trick him out of possession of said ranch, by means of a clandestine suit of ejectment," founded on a pretended deed or conveyance of said ranch, made by the defendant Owens to the plaintiff, upon which the plaintiff intends to rely in the trial of the action; that said deed is a cloud upon his title; and that the claim based upon it "is without right, invalid and unfounded;" therefore, he asked that he be quieted in his title and possession against said claim, and that Reay, the plaintiff in ejectment, be forever enjoined from prosecuting the action, and from commencing and prosecuting any other action against him for the recovery of said ranch.

No answer was filed to the intervention by Butler and Owens. Each made default and judgment by default was entered against them. Reay filed an answer containing specific denials of all the allegations contained in the complaint, and on the eighth of February, 1868, moved to strike out the intervention on the ground that the proceeding was not applicable in an action of ejectment. The motion was denied and he excepted.

The record shows that the case came on for trial on the twenty-fifth of February, 1868, before a jury empaneled and sworn to try the cause; that, in the course of the trial, upon motion of the intervenor, the court, over the exception of the plaintiff, discharged the jury, and ordered that the case be put upon the equity calendar for trial by the court sitting without a jury; that afterwards, in November, 1869, the intervention was tried and submitted; that no decision was rendered until the fourteenth of April, 1873, when findings for the intervenor were ordered to be "drawn and submitted for settlement." That the findings were not settled until the thirty-first of December, 1879, when they were filed, and upon them a de-

cree was entered on the same day, adjudging that, "at the time the action of ejectment was commenced the intervenor was, and still is, the owner of the land described in the complaint, and complaint in intervention, and neither the plaintiff nor either of the defendants, Butler or Owens, had, or have, any right or title thereto, and the facts as to the possession and title entitles the intervenor to a decree quieting him in his title and possession to the said land in question against the plaintiff," and "that the plaintiff, J. W. Reay, be, and is hereby, perpetually enjoined from further prosecuting his complaint in ejectment in this case, and from all further proceedings therein in this cause, and from bringing and prosecuting any other action of ejectment *for the Speck ranch, the land in* the complaint, and the complaint of intervention described against the intervenor's servants or tenants by collusion with them not to inform the intervenor thereof."

The contention which is made on the appeal is that the court below erred in (1) denying the motion to strike out the intervention; (2) discharging the jury impaneled and sworn to try the case, and refusing to try the original action; (3) ordering the case to be submitted upon the issues joined in the intervention only, and (4) denying the motion to set aside the decision and judgment announced therein. This contention involves the regularity of the proceedings in intervention, and the right of intervention in an action of ejectment.

Assuming that the right existed, we think that the plaintiff in ejectment was entitled to a trial of the issues joined between himself and the defendants, and that he had a right to a trial by jury: Sec. 153, Pr. Act; Weber v. Marshall, 19 Cal., 447.

The statute under which the intervention was inaugurated required that the complaint be filed before or after the joinder of issue in the original action, and at such a time as would not interfere with or delay the trial thereof: Sec. 660, Pr. Act; Hocker v. Kelly, 14 Cal., 164. And after joinder of issue in the intervention in the action, it was made the duty of the court to try and decide both issues at the same time. Sec. 662 of the Practice Act, Stats. 1874, p. 73, declared that "the court shall determine upon the intervention at the same time that the action is decided." Intervention, under the statute, therefore, merely results in the addition of a new party or new parties to an original action, for the purpose of hearing and determining, at the same time, all conflicting claims which may be made to the subject matter in litigation. It was not intended to change the nature and character of the action itself, or to stop the machinery of a trial thereof. The denial of the right of the plaintiff to a jury trial was, therefore, erroneous, and the discharge of the jury which had been impaneled and sworn to try the action was irregular.

Besides, the intervenor did not claim a right to the demanded premises in conflict with the right of entry asserted by the plaintiff in the action of ejectment against the defendants. In his complaint, he alleges that he is "owner and in possession of all that *part* of

the demanded premises known as and called Speck ranch (and otherwise as Treadwell's ranch)," which "is within the demanded premises." He thus asserted a right to only *part* of the demanded premises, but the court adjudged him to be the absolute owner of *all* the demanded premises, and perpetually enjoined the plaintiff from prosecuting his action, and from ever thereafter maintaining any other action for the same land. This was error: Hayes v. Martin, 45 Cal., 559. Moreover, the intervenor admitted, because he alleged that he was in the actual possession of all the land which he claimed, under paramount title to it. He was, therefore, vested with complete proprietorship; and neither between him and the plaintiff in the action, nor between him and the defendants, was there any conflicting claim as to the possession. The plaintiff claimed no right of entry against him, and he claimed no right of entry against the plaintiff, nor against the defendants. Ejectment was brought against the defendants only; and they, having appeared by an attorney, with whom there could have been no collusion, because he was the intervenor himself, denied the right of the plaintiff to possession, and admitted possession in themselves as licensees of their landlord, the intervenor. The right of possession was, therefore, the only matter at issue between them and the plaintiff. No ejectment is maintainable where a plaintiff has not a legal right of entry against defendants named in the action; the intervenor was not named as a party, he was not, therefore, connected in any way with the matter at issue between the parties. He did not claim to have derived title to the demanded premises from either the plaintiff or defendants or either of them; and he *did* claim to be in actual possession and vested with title paramount to both. In ejectment, a person who is in no way connected with the right of possession asserted by the plaintiff or the defendant, but on the contrary, alleges title in himself paramount to both, has no right of intervention: Porter v. Garasino, 51 Cal., 559.

Upon the allegations of his complaint the intervenor had no cause of intervention. The alleged facts may have constituted a direct cause of action in equity under section 254, practice act, independent of the ejectment suit. Intervention was, therefore, unnecessary, because as the intervenor had appeared as attorney for the defendants he could have defended the action for them, or, if it were possible, under the circumstances of his appearance as their attorney, to have presumed collusion between the plaintiff and his clients, as his tenants, he, as landlord, could have had himself substituted as a co-defendant with them, or as a defendant in their stead: Dutton v. Warshauer, 21 Cal., 619; Valentine v. Mahoney, 37 Id., 389. Otherwise, having no personal connection with the question at issue in the case, there was no way in which he could be prejudiced or his rights affected by any judgment therein, unless, in assuming the defense, he himself put the title in issue: Russell v. Mallon, 38 Cal., 259; Valentine v. Mahoney, *supra*; and that being the case the right of intervention was inapplicable: Horn v. Volcano Water Company, 13 Cal., 62.

Whether intervention is applicable at all to an action of ejectment, it is not necessary, in this case to determine. As we have already announced, where a person does not claim to have derived title from the plaintiff or defendant in the action, and does assert title in himself paramount to both plaintiff and defendant, there can be no intervention: Porter v. Garasino, *supra*.

Judgment and order reversed and cause remanded for further proceedings.

ROSS, J., and MCKINSTRY, J., CONCURRING. We concur in the judgment and in what is said by Mr. Justice McKee, down to the words "moreover, the intervenor admitted," etc. We also agree that the facts stated in the complaint of Treadwell are insufficient to show a cause of intervention on his part in the action of ejectment.

No. 9,136.

WALTON v. KARNES.

Department One. Filed July 30, 1885.

STATUTE OF FRAUDS—CONTRACT FOR PURCHASE OF LAND—ADVANCE OF PURCHASE PRICE—RESULTING TRUST.—The defendant orally agreed to advance for the plaintiff certain money to be used in paying the purchase price for land, and, as security for such advances, to take the contract for the sale thereof in his own name. This was done. *Held*, that the contract was not void under the statute of frauds, and that a resulting trust was created in the land to the extent of the advances.

APPEAL from a judgment of the superior court of Fresno county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Campbell & Hinds, for the appellant.

Bennett & Wiggington and *E. D. Edwards*, for the respondent.

MCKEE, J. This case, as presented by the record, is this: By a verbal arrangement between plaintiff and defendant in the action, entered into pending a contest, between the plaintiff and other persons, before the land agent of the Southern Pacific Railroad Company, for the right to purchase from the company the southwest quarter of section three, township fourteen south, range twenty-two east, Mount Diablo base and meridian, the defendant agreed, "if the contract of sale should be awarded plaintiff, to advance for him the money necessary to make the first payment upon the land, and the plaintiff agreed to repay the defendant the moneys advanced by him for that purpose, with interest at one and a half per cent per month from the date of the advances until paid, and to secure their payment by causing the contract of sale to be issued in the name of the defendant, to be held by him until repayment, when the contract was to be assigned to the plaintiff."

The right to purchase was awarded to the plaintiff, and on the fifteenth of December, 1881, defendant advanced for him the sum

of four hundred and ninety-two dollars, as the first payment of the purchase money of the land. At plaintiff's request the contract of sale was made in the name of the defendant and delivered to him. Twelve months after the transaction of purchase another payment for interest in advance becoming due on the contract, defendant, at plaintiff's request, advanced it for the plaintiff upon the same terms as to interest and security. These advances and the interest thereon aggregated the sum of eight hundred and ninety-five dollars. This sum, the plaintiff, on the twenty-second of January, 1883, tendered to the defendant, with a request for the assignment of the contract. The defendant refused to accept the money or to assign the contract, and he contends that he had the right to do so, because, as the verbal agreement between him and the plaintiff related to real property, it was void.

But it is not void; because, as the contract of sale was taken by the defendant as security for repayment of the advances made by him for the plaintiff in purchasing the land, a resulting trust in the land was created to the extent of the advances. Section 853 of the civil code declares: "When a transfer of real property is made by one person and the consideration thereof is paid by, *or for another*, a trust is presumed to result in favor of the person by, *or for whom*, such payment was made."

Where a resulting trust exists, the statute of frauds has no application: Millard v. Hathaway, 27 Cal., 139.

Judgment and order affirmed.

Ross, J., concurred.

McKINSTRY, J., CONCURRING. I concur: As I understand the transaction, the plaintiff paid the whole of the purchase money which was in fact paid. The money was loaned by the defendant to the plaintiff, and the former paid it to the railroad company as *agent* of the latter. The case is not affected by the circumstance that other payments may remain to be made on the contract. Certainly, the defendant is in no better position than if he had actually made all the other payments himself. Although a verbal agreement by A. to purchase land for B. may not be given in evidence to establish a resulting trust, where the entire purchase money has been paid by A. and the conveyance taken in his name, yet, if any part of the purchase money is shown to have been paid by B., a verbal agreement may then be proved which shall have the effect to deprive A. of all beneficial interest in the purchase, and to clothe the entire estate in his hands, with a trust in favor of B.: Hidden v. Jordan, 21 Cal., 92.

WEST COAST REPORTER.

WHOLE NO. 85. AUGUST 13, 1885. VOL. VII. NO. 5.

CIRCUIT COURT, DISTRICT OF OREGON.

UNITED STATES *v.* ADAMS ET AL.

July 27, 1885.

LIABILITY OF A SURETY.—The liability of a surety in an official bond is *stricti juris*; and he is not to be held responsible for the conduct of his principal beyond the scope of his undertaking, reasonably construed.

ASSISTANT SECRETARY OF THE TREASURY—AUTHORITY OF.—The assistant secretary of the treasury is not the deputy of the secretary, but only his aid, and his acts are not valid unless specially authorized by law or prescribed by the secretary: Secs. 161, 245 R. S.; but a letter written by him to a collector of customs concerning the deposit of money in his custody, will be presumed to have been written by authority of the secretary until the contrary appears.

CASE IN JUDGMENT.—In 1866, A. was collector of customs at Astoria, Or., when and where he received a letter signed by the assistant secretary of the treasury, directing him to take forty-six thousand five hundred dollars in gold coin, theretofore received by him in payment of duties, and then in his custody, to San Francisco, and deposit the same with the assistant treasurer; in pursuance of which direction the collector sailed for San Francisco on the current steamer with said money in his trunk, and on the way twenty thousand dollars of the same was stolen therefrom without any want of ordinary care and diligence on his part, a portion of which was afterward recovered, so as to reduce the loss to twelve thousand six hundred and ninety-six dollars and twenty-eight cents, for which the government sued the collector and his sureties on their bond; the defendants pleaded these facts in defense and claimed they were not liable on the bond, to which the plaintiff demurred. *Held*, (1) That the carriage of this money to San Francisco was no part of the duty of A. as collector: Sec. 3,639, R. S.; and therefore his sureties are not responsible for his conduct while so engaged; and (2) that in the transportation of said money, A. was simply acting as a private carrier for the government and is not liable on his bond for his conduct, or otherwise, except for the want of ordinary care and diligence.

ACTION on the bond of collector of customs. The opinion states the facts.

James F. Watson, for the United States.

James K. Kelly, for the defendant Adams.

George H. Williams, for the defendants Parker and Gillette.

DEADY, J. This action is brought by the United States to recover of the defendants the sum of twelve thousand six hundred and ninety-six dollars and twenty-eight cents, with interest at six per centum per annum from September 18, 1873.

The complaint alleges that in 1865, the defendant William L. Adams was appointed collector of customs for the district of Oregon, and that on September 15 of said year, he, together with the defendants Charles L. Parker and Preston W. Gillette, as his

sureties, executed their bond to the plaintiff in the penal sum of fifty thousand dollars, conditioned as follows: "That the said Adams has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of said office according to law;" that said Adams failed to keep the condition of said bond, in this, that of the moneys received by him as collector aforesaid, he failed and refused to pay over to the proper officers of the treasury department the sum of twelve thousand six hundred and ninety-six dollars and twenty-eight cents.

The answer of the defendants contains a specific denial of the material allegations of the complaint, except the execution of the bond, and two special pleas or defenses, as follows:

(1) That on and prior to February 3, 1866, the defendant Adams, as collector of customs at the port of "Astoria," Oregon, had in his custody forty-six thousand five hundred dollars in gold coin and one thousand dollars in currency, belonging to the plaintiff; that, a short time prior to said date, said Adams had received instructions from the treasury department, through the assistant secretary thereof, "to deposit said moneys with the assistant treasurer of the United States at San Francisco," California, with advice that only the actual expenses incurred "in making the deposit and returning to Astoria would be allowed him;" that, in obedience to said instructions, said Adams, on February 3, 1866, sailed from Astoria, with said money, on the steamship Oregon, for San Francisco, with the intention of personally depositing the same, as directed by the department; that said money was secured by said Adams on board the said vessel "in the best manner he was able to provide, and carefully watched and guarded by him, as much as he was able to do, during the voyage to San Francisco," but that, about February 6, while off the coast of California, twenty thousand five hundred dollars of said gold coin was stolen from the trunk in which it was deposited by some of the servants employed on said vessel, "during the temporary and necessary absence of said Adams from his room in which said trunk was kept, and without any fault, negligence or carelessness on his part;" that all of said money was afterwards recovered from the thieves and paid into the treasury of the United States, except the sum of twelve thousand six hundred and ninety-six dollars and twenty-eight cents, which is the money sought to be recovered by this action.

(2) That said Adams, on February 3, aforesaid, had in his possession, as collector of customs aforesaid, the money of the United States aforesaid, at Astoria, when and where he received instructions from the proper officer of the treasury, as aforesaid, to receive and carry said moneys, "as a special carrier" from the custom house in Astoria, to the assistant treasurer in San Francisco, which he then and there undertook to do, as aforesaid; "that as such carrier said Adams used all proper precautions to safely keep the said moneys so intrusted to him," and that "the passage by steamer was the easiest and safest way of travelling with money from Astoria to

San Francisco;" that, on the passage, twenty thousand five hundred dollars of said gold coin was stolen from said Adams, as aforesaid, "without any fault, negligence or carelessness" on his part; that said Adams was not authorized to employ any person to assist him in transporting said money, and received no compensation therefor, except his necessary expenses from Astoria to San Francisco, and return to Astoria; and that through the efforts of said Adams all the money so stolen was recovered and paid to the proper officers of the United States, except the sum of twelve thousand six hundred and ninety-six dollars and twenty-eight cents, for which this action is brought.

To these two pleas the United States demurs, for that the facts stated therein do not constitute a defense to the action.

The argument in support of these pleas is this: (1) The defendant Adams, in transporting this money to San Francisco, was not acting as collector of customs, at Astoria, or in the district of Oregon, but as a special or private carrier, at the request of the treasury department, and that, as said carrier or bailee, he was only bound to the exercise of ordinary care and diligence, and is, therefore, not responsible for a loss by larceny that occurred, notwithstanding the use of such care and diligence; and (2), although it should be held that Adams is liable for such loss either as a common carrier or collector, still he was not then engaged in the performance of a duty within the obligation of his bond, or the purview of the statute regulating his duties thereunder, and, therefore, the sureties in such bond are not liable thereon for such loss.

The argument in support of the demurrer is, first, that the assistant secretary of the treasury had no authority to direct the defendant Adams, to transport this money to San Francisco, and, therefore, when he removed it from the custom house and undertook to carry it to that place, he did so in his own wrong, and contrary to the condition of his bond; but if the assistant had such authority, then said Adams, in obeying his instruction, was acting as collector, and in either case he and his sureties are liable on their bond for the loss accordingly, for the law is well settled that a larceny or robbery will not excuse the parties to a collector's bond for a failure to pay over all money that may have come into his hands as such collector, citing United States v. Prescott, 3 How., 578; United States v. Morgan, 11 How., 154; United States v. Dashiel, 4 Wall., 182; Boyden v. United States, 13 Wall., 17.

By sections 1 and 2 of the act of September 2, 1789: 1 Stat., 65; sections 233-34, R. S.; organizing the treasury department, the secretary of the treasury was authorized to appoint an assistant secretary; and by section 13 of the act of March 3, 1849: 9 Stat., 396; sec. 245, R. S.; the provision for the appointment of such assistant was repeated with a specification of certain powers and duties, and concluding as follows: "who shall perform all such other duties in the office of the secretary of the treasury, now per-

formed by some of his clerks, as may be devolved on him by the secretary of the treasury."

By section 5 of the act of March 3, 1857: 11 Stat., 220; the appointment of the assistant secretary was given to the president; and by section 3 of the act of March 14, 1864: 13 Stat., 26; it was further provided, that "an additional assistant secretary of the treasury" should be appointed by the president, "who shall perform all such duties in the office of the secretary of the treasury, belonging to that department, as shall be prescribed by the secretary of the treasury, or as may be required by law."

An "assistant" is one who stands by and helps or aids another. He is not a deputy, and cannot, therefore, act in the name of and for the person he assists, but only with him and under his direction, unless otherwise expressly provided by law. It is a question whether an assistant secretary, appointed under the act of 1849, could be even authorized by the secretary to do anything in his department, except such acts or duties as were performed at the passage of such act by some of the secretary's clerks. But no such restraint is imposed on the power of the secretary as to the assistant authorized by the act of 1864. Any duty pertaining to his office which the secretary may prescribe for him, such assistant may do; and it is highly probable that in practice the same rule was followed, as to the first assistant. Besides, it is hardly to be doubted that in 1849, some clerk in the treasury department was performing the duty of directing collectors as to the disposition of public money in their hands.

But I think that an act done by the assistant and within the authority and power of the department, must, until the contrary appears, be presumed to have been done under the direction of the secretary of the treasury. In U. S. v. Tichenor, 8 Saw., 152, this court said that where the president was authorized to reserve land for certain military purposes, the action of the secretary of war, to whose department the subject belonged and the duty pertained, would be presumed, in the absence of evidence to the contrary, to have been authorized by the president.

For the purpose, then, of this case, it must be presumed that the assistant secretary was acting in pursuance of the direction of the secretary, when he required the defendant Adams to take this money to San Francisco and deposit it with the assistant treasurer at that place.

By section 15 of the act of August 6, 1846: 9 Stat., 62–3; sec. 3,616, R. S.; persons having public money of the United States, and not included in the directions contained in section 9 of said act: Sec. 3,615, R. S.; as was not the collector of the district of Oregon, might pay the same to the treasurer or assistant treasurer of the United States or such other depositary, constituted in pursuance of the law, as the secretary of the treasury might designate; and by section 6 of said act: Sec. 3,639, R. S.; all public officers, including collectors of customs, "are required to keep safely, without

loaning, using, depositing in banks, or exchanging for other funds than as allowed by this act, all the public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered by the proper department or officer of the government to be transferred or paid out; and when such orders for transfer or payment are received, faithfully and promptly to make the same as directed, and to do and perform all other duties as fiscal agents of the government which may be imposed by this or any other act of congress, or by any regulation of the treasury department made in conformity of law."

Admitting that the order of the assistant secretary was given under the direction of the secretary, and also that the latter had the authority to direct or employ the defendant Adams, to carry this money to San Francisco, the sureties maintain it was a duty or service for the discharge or conduct of which they were in no way bound. The undertaking of the defendant Adams, as collector, is stated in the condition of his bond as follows: "To truly and faithfully execute and discharge all the duties of his office according to law;" which duties were, according to section 6 of the act of 1846, *supra*, "to keep safely * * * all the public money collected by him" till the same was duly ordered "to be transferred or paid out;" and "faithfully and promptly" make such transfer or payment when required.

There is no provision here looking to the collector being engaged in the transportation or carriage of public money from one state or district to another for a distance of six or seven hundred miles.

It may be, and probably is, the duty of a collector, under this section, to transfer the public money in his possession when so ordered, by depositing the same with a depositary in the town or place where his office is situated, or its immediate vicinity, and that his sureties are liable for any loss that may occur while he is so engaged, from either a larceny or robbery. To safely keep the public money under these circumstances may be a part of the collector's duty to faithfully "transfer" the same when required, and if so, the undertaking of the sureties makes them responsible for its faithful performance. But I doubt very much whether the duty of a collector "to transfer" public money in his possession, when required, includes the carrying or transportation of such money to any point beyond the vicinity of the custom house, even in his own district, as from Astoria to Portland.

The transfer and transportation of money from hand to hand and place to place are business transactions, and parties who undertake for a collector as sureties expect, and have a right to expect, that when the government engages in any such transaction, with reference to the money in the possession of their principal, it will do so in a business way and according to business methods.

At the time of this transaction, as well as before and since, the usual method on this coast of transmitting any quantity of coin was y express; and that is the way this money should have been sent

to San Francisco. Assuming that there was no designated depositary in Oregon at the time, the collector should have been instructed to transfer the amount to Wells, Fargo & Co. at Astoria, for transportation to San Francisco, who then would have been responsible for its safe delivery at the latter place. No business man in Portland would have thought of sending a clerk or messenger to San Francisco with forty thousand dollars in coin, or the tenth part of it; and the assistant secretary who directed it to be done in this case, unless he did so on the advice of the collector, is the primary cause of this loss and morally responsible for it.

The improvidence of this order appears to have soon become known to the department, for it was stated and admitted on the argument of the demurrer that, within a day or two after the collector had left for San Francisco, a counter command was received at his office, directing him to send the money by Wells, Fargo & Co.

The law is well established, that the liability of a surety is *stricti juris;* and, therefore, he is not to be held responsible for the conduct of his principal beyond the scope of his undertaking, reasonably construed. But the rights and interests of the public, to whom the surety has voluntarily become bound for the conduct of his principal, are not to be overlooked in the consideration of the matter, and, therefore, courts ought not to be astute or alert, as they sometimes appear to have been, to raise doubts and start quibbles, to save a surety from the otherwise legal consequence of his undertaking. Yet there is nothing in the nature or purpose of his undertaking that should make him liable beyond the fair and reasonable construction of its terms and the provisions of law relating thereto, considered in the light of the surrounding circumstances and with reference to the object of the transaction: U. S. v. Cheesman, 3 Saw., 429, and cases there cited. Nor do the words of the statute, section 3,639, revised statutes, to the effect that the collector shall "do and perform all other duties as fiscal agent of the government" prescribed by law, include the duty of acting as agent for the transportation of this money, without some law directly imposing such duty on him or authorizing the secretary to do so in his discretion. This section, it must be noticed, includes assistant treasurers, receivers, and all other custodians of public money, and the provision in question must be construed in each case with reference to the nature of the office and the duties primarily and ordinarily pertaining thereto. An assistant treasurer might very properly be required to receive, keep and pay out public money in any quantity and from any source, but not to act as a collector of revenue, either under the excise or tariff laws. Nor can a collector of customs be legally charged with the duty and his sureties with the responsibility of receiving, keeping and paying out sums of money not collected by him as duties on imports. And even if this could be done, it would require a still more expanded construction of the provisions to require a collector to act as a carrier of public money, at the risk of his sureties.

In U. S. v. Singer, 15 Wall., 122, Mr. Justice Field says: "The

official bond of parties undoubtedly covers not merely duties imposed by existing law, but duties belonging to, and naturally connected with, their office or business, imposed by subsequent law. But the new duties should have some relation to or connection with such office or business, and not be disconnected from and foreign to both." And in the U. S. v. Cheesman, *supra*, 431, Mr. Justice Sawyer, in considering the effect of this very provision, says: "We think these words only intended to include such duties as naturally and ordinarily belong to the particular officer giving the bond, or have some obvious relation to such duties, and such as the sureties acquainted with the duties of the various public officers, as usually devolved on them by law, might reasonably be expected to contemplate at the time of executing the bond, as likely to be imposed upon their principal in case the exigencies of the government should require it; and not those duties which are usually imposed upon, and more appropriately belong to, an entirely different class of officers."

Neither is the defendant, Adams, liable on his bond as collector for this loss, if at all. In carrying this money to San Francisco, he was acting not as collector, but as a carrier for the department. In contemplation of law, collector Adams delivered—transferred—this money to carrier Adams, at Astoria, and thereafter his duty and responsibility concerning it, as collector, ceased, and that as carrier began. His liability as carrier does not arise on his bond as collector, nor is it measured by his duty as such. But his liability arises upon the obligation which the law imposes on him as a carrier. If he was a common carrier—a person undertaking for hire, to carry the treasure or goods of all persons indifferently—he would be responsible for the loss, although it was the result of a larceny. A common carrier is an insurer of the safe delivery of the goods committed to his care, unless the loss is caused by the act of God or the public enemy: Orange Bank v. Brown, 3 Wend., 162; Lawson's Con. of Car., section 1, 3; Story on Con., section 920; Story on Bailments, section 496.

But Adams was not engaged in the business of a common carrier, nor acting as such. He did not hold himself out as a person engaged in the business of carrying treasure or anything else. He only undertook, at the request of the department, to carry this particular money, in consideration of receiving his actual expenses while so engaged, without any deduction of his salary during his absence from his office. He was, therefore, a private carrier, and responsible only as an ordinary bailee for hire, namely, for ordinary care and diligence; which, in this case, is alleged to have been duly bestowed on the undertaking: Story on Con., 920; Story on Bailments, section 457; Allen v. Sackrider, 37 N. Y., 341.

Upon the facts stated in these two defenses, neither the principal nor his sureties in this bond are liable for this loss, and the demurrer thereto must be overruled.

SUPREME COURT OF CALIFORNIA.

No. 9,665.

PICO *v.* COHN ET AL.

In Bank. Filed July 30, 1885.

NEW TRIAL—ERRORS OF LAW WAIVED IF NOT SPECIFIED.—Where a notice of motion for a new trial states that it would be made on errors of law, and no errors are specified, the court will presume that they were disregarded, in accordance with section 659, subdivision 3, of the code of civil procedure.

THE SAME—INSUFFICIENCY OF EVIDENCE—DISCRETION—ABUSE OF—APPEAL.—A motion for a new trial on the ground of insufficiency of the evidence to justify the verdict or decision, is addressed to the sound legal discretion of the court below; and on appeal from an order granting a new trial the supreme court will not reverse the order, unless it appears that there has been a manifest abuse of discretion. No such abuse is shown in this case.

APPEAL from an order of the superior court of Los Angeles county, granting the defendants a new trial. The opinion states the facts.

Glassell & Smith, and *Graves & Chapman*, for the appellant.

Brunson & Wells, and *R. H. Chapman*, for the respondents.

THORNTON, J. This is an appeal from an order granting the motion of defendants for a new trial. The notice of the motion for a new trial stated that it would be made on errors of law, and the insufficiency of the evidence to justify the decision.

As the errors of law were not specified as directed by the code, we must presume that they were in accordance with the statute, code of civil procedure, section 659, subdivision 3, disregarded. The ground of insufficiency of evidence alone remains.

On the hearing of the above motion, the court, on the twenty-fourth of May, 1884, made an order granting it, unless the plaintiff within five days file his written consent to a modification of the decree herein, so that it shall require the payment by plaintiff to defendants within thirty days from the date of the order of the sum of one hundred and thirty-eight thousand dollars, with legal interest from such date, instead of the sum of one hundred and three thousand dollars as stated in the decree, and on the filing by the plaintiff, within the time mentioned, of his assent to such modification, the new trial be denied and the judgment modified accordingly. The plaintiff refused his consent to this modification, and a new trial was ordered.

The order could only have been granted on the grounds on which it was asked by defendants. The defendants had nothing to say, and were not called on to say anything in regard to the modification set forth in the above order. The plaintiff having refused to give his consent, the motion of defendants then stood as if no such order had been made. We are thus driven to pass on the order for a new trial as having been made on the insufficiency of the evidence to justify the court's decision. If we were to reverse the order, the judgment for one hundred and three thousand dollars would stand

unchanged, although the court had substantially admitted an error in the decree in requiring the plaintiff to consent to a change in it, requiring him to pay a much larger sum, as a condition to its refusing defendant's motion. This would seem to be, under the circumstances, clearly unjust.

The learned counsel for plaintiff is obviously mistaken in assuming that the defendants, in their specifications of the insufficiency of the evidence, have failed to make objection to so much of the findings as would justify the judgment rendered by the court below, or that their specifications only extended to the amount which the plaintiff should be adjudged to pay.

It will be observed that the case of plaintiff rests upon the allegation that defendant Cohn agreed to advance, and did advance, certain sums of money to plaintiff, to secure the payment of which the deed executed by him to defendants, sought herein to be declared and adjudged a security, was given. This was denied by defendants, who set up that there was no advance made or agreed to be made by Cohn, but that the money paid to the plaintiff by defendants was a payment for the property in controversy, absolutely purchased of plaintiff by defendants, and that the deed was made on such purchase and not at all as security for the payment of any sum whatever. Now, one of the specifications of insufficiency goes to this issue. The defendants set forth in their specifications that the evidence is insufficient to sustain so much of finding four as finds that it was understood and agreed that said Cohn should advance the amount of said liens as estimated by him, but, on the contrary, the evidence shows that Cohn absolutely refused to advance any money for and on account of said Pico.

This matter of advance goes to the very foundation of plaintiff's case, for if there was no agreement for an advance and no advance, the case of the plaintiff is at an end.

There are other matters specified of the same character, but for the purposes of the argument, no others need be stated.

In Peters v. Foss, 16 Cal., 357, it was held that a motion for a new trial is addressed to the sound discretion of the court, and this court can interfere only in case of a plain abuse of discretion by the court below. This court affirmed the same rule in Quinn v. Kenyon, 22 Cal., 82, and in the opinion it is said: "It is only in rare instances and upon very strong grounds that this court will set aside an order granting a new trial." And it has been uniformly held by this court that a motion for a new trial on the ground of insufficiency of the evidence to justify the verdict or decision is addressed to the sound legal discretion of the court below, and that on appeal from an order granting a new trial this court will not reverse the order unless it appears that there has been a manifest abuse of discretion: Hall v. Bark Emily, 33 Cal., 522; Phelps v. Union C. M. Co., 39 Id., 410; Pierce v. Schaden, 55 Id., 406; Bronner v. Wetzlar, Id., 419; Gerold v. The J. M. Brunswick Co., 6 West

Coast Rep., 761. As we find no abuse of discretion in making the order herein appealed from, we should act in utter disregard of a well settled rule of this court, were we to disturb the order in this case.

Our judgment is that the order should be affirmed, and it is ordered accordingly.

ROSS, J., MYRICK, J., MCKINSTRY, J., and MORRISON, C. J., concurred.

No. 8,835.

SOMERS *v.* OVERHULSER ET AL.

Department One. Filed July 30, 1885.

PURCHASE OF LAND—CONSIDERATION PAID BY ANOTHER—TRUSTS.—When land is purchased, for which one party pays the consideration and another party takes the title, a resulting trust immediately arises in favor of the party paying the consideration, and the other becomes his trustee; and if one party pays only a part of the consideration, the party taking the title to the whole land becomes a trustee for the other, *pro tanto.*

APPEAL from a judgment of the superior court of Fresno county, entered in favor of the defendants.

E. D. Edwards and *H. S. Dixon* for the appellant.

H. C. Tupper, Tupper & Terry and *E. C. Winchell,* for the respondents.

ROSS, J. It is the settled rule in this state, as elsewhere, that, when land is purchased, for which one party pays the consideration and another party takes the title, a resulting trust immediately arises in favor of the party paying the consideration, and the other party becomes his trustee; and, also, that, if the one party pays only a part of the consideration, the party taking the title to the whole land becomes a trustee for the other party, *pro tanto*: Case v. Codding, 38 Cal., 191. The facts of the present case bring it within this rule. See also section 2,224, civil code.

Judgment reversed and cause remanded with directions to the court below to overrule the demurrer to the complaint, with leave to defendants to answer.

MCKEE, J., and MCKINSTRY, J., concurred.

No. 9,896.

BROWN v. WILLIS.

Department One. Filed July 30, 1885.

MORTGAGE—FORECLOSURE OF—ENFORCEMENT OF DEBT.—Under section 726 of the code of civil procedure, whatever the form of the debt, a mortgagor can be legally compelled to pay no part of it until a decree is entered for the sale of the mortgaged premises, and the liability which shall then accrue to him is a liability to pay only a deficiency which shall appear on the sheriff's return.

APPEAL from a judgment of the superior court of San Bernardino county, entered in favor of the defendant. The opinion states the facts.

Byron Waters, for the appellant.

C. W. C. Rowell, for the respondent.

ROSS, J. The findings show that on the second day of September, 1878, an action was commenced in the late district court of the eighteenth judicial district, by one Aldrich, against the plaintiff and defendant to the present action—H. M. Willis and Joseph Brown—and Amelia Willis, Jr., to foreclose a mortgage that had been given by H. M. Willis, as security for a note executed by him to one Drew, Drew having assigned the note and mortgage to Aldrich. Brown was made a party to that action because he held, as assignee, a subsequent mortgage upon the same premises that had been given by Willis to secure a note executed by him November 22, 1875, to one Thomas, and made payable one year after its date. The note held by Brown, was, therefore, due at the time of the commencement of the action by Aldrich to foreclose the first mortgage executed by Willis, and, as both Willis and Brown were parties to that action, the court, by its decree, could have settled the respective rights of all of the parties. The purpose of making the holder of the second mortgage—it being of record—a party to the suit to foreclose the first mortgage was, of course, to cut off the equity of redemption. The findings here show that in that action Brown set up his note and mortgage, and as the note was due, if his pleadings were appropriate, as they should have been, the court could and should have ascertained, not only the amount due from Willis to Aldrich on the first note and mortgage, but also the amount due from him to Brown on the second note and mortgage, and, by its decree, have directed a sale of the mortgaged property, or so much thereof as should be necessary, and the application of the proceeds of the sale to the payment of the costs and expenses of sale, and the amount due, first, to the plaintiff, Aldrich, on the first note and mortgage, and, secondly, of the amount due to the defendant, Brown, on the second note and mortgage, and further directing, in the event the sheriff's return should show the proceeds to be insufficient, and a balance to remain due on either or both of the amounts found due by the decree, that judgment be docketed for said balance against

the defendant so found personally liable for the debt, which, under the law, would have become a lien on such real estate as the judgment debtor might have in the county, and on which an execution might have been issued as in other cases. In Biddel v. Brizzolara, 64 Cal., 362, it was held that, under the provisions of our statute, code of civil procedure, section 726, that, whatever the form of the debt, the mortgagor can be legally compelled to pay no part of it until decree is entered for the sale of the premises mortgaged, and the liability which shall then accrue to him is a liability to pay only a deficiency, which shall appear on the sheriff's return. "Every person," said Mr. Justice Kent in La Guen v. La Gouverneur, 1 Johns. Cases, 504, "is bound to take care of his own rights, and to vindicate them in due season and in proper order. This is a sound and salutary principle of law. Accordingly, if a defendant, having the means of defense in his power, neglects to use them, and suffers a recovery to be had against him in a competent tribunal, he is forever precluded."

It results, we think, that the subsequent action brought by plaintiff, Brown, upon the note executed by defendant, Willis, to Thomas, cannot be maintained.

Judgment affirmed.

McKINSTRY, J., and McKEE, J., concurred.

No. 20,120.

EX PARTE DRESLER, ON HABEAS CORPUS.

Department Two. Filed July 30, 1885.

WITNESS—UNREASONABLE DETENTION—HABEAS CORPUS.—A witness, who has been detained, as such, for ninety days, and after several continuances in the case which are not satisfactorily accounted for, is entitled to be discharged, on *habeas corpus*.

APPLICATION for a writ of *habeas corpus*. The opinion states the facts.

John D. Whaley, for the petitioner.

J. N. E. Wilson, contra.

THE COURT. We are of opinion that the petitioner is entitled to his discharge under article i., section 6, of the constitution, which provides that witnesses shall not be unreasonably detained. It appears that the witness has been detained as such for ninety days, and there have been several continuances in the case which are not satisfactorily accounted for.

The petitioner is discharged from custody.

No. 9,354.

MEYSAN v. CHABRIE.

Department Two. Filed July 31, 1885.

ENTRY OF JUDGMENT ESSENTIAL TO APPEAL.—An appeal from the judgment cannot be considered if the record shows no entry of it.

MOTION TO VACATE JUDGMENT—PAPERS USED ON MUST BE AUTHENTICATED. —An order on a motion to vacate a judgment by default, will not be reversed on appeal when the record contains no authentication of any papers or documents used on the hearing of such motion.

APPEAL from the superior court of Inyo county. The opinion states the facts.

Reddy & Conklin, for the appellant.

Langhorne & Miller, for the respondent.

THE COURT. The appeal from the judgment cannot be considered, as the record shows no entry of it: McLaughlin v. Doherty, 54 Cal., 519; Preston v. Hearst, Id., 596.

It does not appear on what the order on the motion to vacate the judgment by default was made. The record shows no authentication in any mode of any papers or documents used on the hearing of such motion. The only document before us, on such appeal, is the order of the court made on the motion, and in this order we see nothing erroneous.

Appeal from the judgment dismissed, and order affirmed.

No. 9,901.

HALEY v. SHEPHERD.

Department Two. Filed July 31, 1885.

WHERE THE EVIDENCE IS CONFLICTING THE JUDGMENT of the court below will not be disturbed.

APPEAL from a judgment of the superior court of Los Angeles county, entered in favor of the defendant, and from an order denying the defendant a new trial.

H. Allen and *S. Haley*, for the appellant.

Bicknell & White, for the respondent.

THE COURT. On an examination of the testimony in this case, we cannot say that the conclusion reached by the court below is not correct.

It seems to us to be in accord with the deed from the mayor and common council of the city of Los Angeles to Basilia Jurado, under which plaintiff claims. The case presented is one of a conflict of testimony, and in such state of the testimony we never disturb the judgment or order of the court below.

Judgment and order affirmed.

No. 11,018.

PARKER v. BERNAL ET AL.

Department Two. Filed July 31, 1885.

APPEAL HELD WITHOUT MERIT, and motion to dismiss denied.

MOTION to dismiss an appeal from the superior court of the city and county of San Francisco.

M. G. Cobb, for the appellants.

C. H. Parker, for the respondent.

THE COURT. The appeal in this case is totally destitute of merit. But as the appeal seems to be regularly taken, we are reluctant to dismiss it directly. The motion to dismiss, is, therefore, denied, which is ordered, with leave to either party to submit the case for decision after the lapse of ten days from the filing of this opinion. So ordered.

No. 20.086.

EX PARTE TITTEL, ON HABEAS CORPUS.

Department Two. Filed July 31, 1885.

SATISFACTION OF JUDGMENT—ASSIGNMENT—CONTEMPT.—A judgment debtor cannot be proceeded against for contempt, at the instance of a person not a party to the suit, claiming under an alleged prior assignment of the judgment, the priority of which is disputed, when a satisfaction of the judgment by the plaintiff in the action is on file and of record.

APPLICATION for a writ of *habeas corpus*. The opinion states the facts.

Robert Ash, for the petitioner.

M. G. Cobb, contra.

THE COURT. When this proceeding was commenced, satisfaction of the judgment had been filed by an assignee of the judgment, one Henry Huber, and entered of record. Before that time the assignee had filed his assignment from plaintiff with the clerk of the court, entitled in the case of Lichtnock v. Tittel, and with the papers in that case. This assignment authorized the assignee Huber to prosecute the suit above entitled, to collect the judgment and receipt therefor, and to enter satisfaction thereof in the name of the assignor or otherwise, as he shall deem proper. Subsequently, on the day the order on defendant to show cause why he should not be adjudged guilty of contempt, in not obeying the judgment of the court, was made a satisfaction piece of the same judgment, was signed, acknowledged and filed by Huber and Lichtnock. So, when the proceeding was commenced and when the motion to punish for contempt was heard, the record showed that the judgment was satisfied and no longer existed.

This proceeding is prosecuted by one C. W. Cramer, who claims to be an assignee prior to Huber. Here, when the motion to commit

was heard, was a satisfaction of the judgment by the plaintiff in the action, on file and of record. This is a sufficient answer to the charge of contempt by a person not a party to the suit, claiming under an alleged prior assignment, the priority of which is disputed.

The petitioner is entitled to his discharge, and it is so ordered.

No. 8,980.

LEVY v. BALDWIN.

Department Two. Filed July 31, 1885.

POSTPONEMENT OF TRIAL—AMENDMENT TO ANSWER—DISCRETION.—It is within the discretion of the court to refuse a second postponement of the trial, or to refuse an amendment to the answer asked for at the trial.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff.

Lloyd & Wood, for the appellant.

Wm. H. Sharp, for the respondent.

THE COURT. The court properly exercised its discretion in refus- a second postponement of the trial, and in refusing the amendment to the answer asked for at the trial. The charge of the court was correct, and the request to charge was properly refused. We find no error in admitting the evidence of plaintiff that the stock mentioned in the complaint was purchased for defendant through E. H. Hall & Co.

There is no error in the record, and the judgment is affirmed.

No. 9,670.

SMITH ET AL. v. CUNNINGHAM.

Department One. Filed August 1, 1885.

GROWING CROPS—ADVERSE POSSESSION—ATTACHMENT.—Crops raised upon land in the actual, exclusive and adverse possession of a third person, cannot be attached at the suit of a creditor of the legal owner of the land.

APPEAL from a judgment of the superior court of San Joaquin county, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The opinion states the facts.

W. L. Dudley, for the appellant.

George E. McStay, for the respondents.

SEARLS, C. This action was brought to recover a quantity of hay or its value.

Plaintiff had judgment.

Defendant moved for a new trial, which was refused, and the cause comes up on appeal from the judgment and order denying the motion for a new trial.

In October, 1882, plaintiff, Mary V. Smith, entered upon the northwest quarter of section 17, township 3 north, range 9 east, M. D. M., in good faith, as a pre-emption claimant, claiming the right to pre-empt the same under the laws of the United States, and has ever since occupied and cultivated, and has been continuously in the actual and exclusive possession of said land, in good faith, as such pre-emption claimant, holding the same adversely to all other persons.

While thus in the actual, exclusive and adverse possession of the land she and her tenant, W. F. Smith, plowed the land and sowed it in wheat, which they cut and made into the hay which the defendant, as the sheriff of San Joaquin county, levied upon, under a writ of attachment duly issued, etc., against the property of J. Wright Johnson.

At the date of the entry of Mary V. Smith upon the land in question, said J. Wright Johnson was, and still is, the holder of the legal title to said land.

J. Wright Johnson, though the legal owner of the land in question, could not have maintained an action to recover the hay. Plaintiffs were in the possession of such land, holding the same adversely to said Johnson—had cultivated, planted, raised and harvested the crop while so holding adversely.

In such case it is settled an action of replevin will not lie. Such action cannot be made the vehicle for testing the title: Pennybecker v. McDougal, 46 Cal., 661; Martin v. Thompson, 62 Cal., 618.

Having no such title to the hay as would support an action for its recovery, it was not subject to seizure by the sheriff, as Johnson's property at the suit of his creditor.

This view of the case was taken by the court below and rendered it unimportant to determine as to the validity of the writ of attachment under which the defendant, as sheriff, levied upon the property. If regular, it could not justify him in taking plaintiff's property, and, if irregular, he was in no worse position.

The errors assigned upon the action of the court in the admission of testimony, so far as supported by the record, are without merit.

We find no error in the record, and the judgment should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

No. 9,617.

ORR v. STEWART.

Department One. Filed August 1, 1885.

ACTION TO QUIET TITLE—TITLE IN GOVERNMENT.—In this state an action to quiet title to land may be maintained, notwithstanding the title thereto is still in the government of the United States.

MORTGAGE—AFTER ACQUIRED TITLE—FORECLOSURE.—When a mortgage of land is made purporting to convey the land in fee, any title afterwards acquired by the mortgagor will feed the mortgage and inure to the benefit of the mortgagee. And this is so although the title, when the mortgage was made, was in the government, and was afterwards acquired by patent from the government, after a foreclosure of the mortgage.

HOMESTEAD ENTRY—MORTGAGE OF NOT VOID.—Section 2,296 of the United States revised statutes, concerning homesteads, does not prevent the voluntary mortgage by the grantee of his homestead entry.

APPEAL from a judgment of the superior court of Siskiyou county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

Nichols & Abels, for the appellant.

J. S. Beard and *J. Brown*, for the respondent.

BELCHER, C. C. In January, 1870, the defendant, Stewart, made a homestead entry in the proper United States land office, upon one hundred and sixty acres of public land in Siskiyou county, under the provisions of the homestead act of 1862. In December, 1875, he mortgaged the land, with its appurtenances, to the plaintiff, Orr, to secure the payment of his promissory note for two thousand dollars. The mortgage was made in the form given in section 2,948 of the civil code. In December, 1880, Orr commenced an action to foreclose his mortgage, and on the seventh of February following, after a trial, obtained judgment for four thousand one hundred and six dollars, and decree of foreclosure and sale. Under this decree the mortgaged property was sold by the sheriff on the fifth day of March, 1881, and bid in by Orr, and on the tenth day of September, 1881, he received the sheriff's deed. Possession of the property was surrendered to him on the same day he received his deed. A few days later Orr conveyed the premises to one Cunningham, and on the fifth of November, 1883, Cunningham and wife reconveyed to Orr. In October, 1883, Stewart went to the United States land office, and was there permitted to commute his homestead entry into a cash entry, and he accordingly then paid the government price for the land in full, and received a duplicate receipt and certificate of purchase therefor. From the time he obtained possession under his sheriff's deed, Orr and his grantor remained in possession of the land up to the time when this action was tried.

This action was commenced by Orr to quiet his title to the said land, and to certain water ditches and water rights alleged to be appurtenant thereto. The defendant answered, denying that the plaintiff owned, or was entitled to the possession of, the land or its appur-

tenances, and setting up his proceedings in the land office to acquire the title.

The case was tried by the court, and the facts found to be substantially as above stated, but judgment was entered in favor of the defendant upon the grounds, as shown by the conclusions of law:

"1. That the legal title to the land in controversy in this action, and to quiet which plaintiff has brought this action, is in the government of the United States.

"2. The fact that plaintiff is in possession, under the decree of foreclosure and proceedings thereunder had, or that he obtained such title as defendant had at the time the mortgage was given, and decree made and entered in the former suit between these parties, does not entitle him to judgment in this action for said land, or ditches, or appurtenances.

"3. That this court cannot, by its judgment and decree, restrain the defendant from proceeding to acquire title under his homestead entry from the government of the United States.

"4. That to entitle the plaintiff to recover said land, he must possess a title superior to that of the defendant, and, of course, superior to that of the United States, or he must possess equities which will control the title in defendant's name, and which he cannot do in this action, defendant not having acquired title from the government of the United States."

The plaintiff appealed from the judgment, and the case comes here on the judgment roll.

The appellant contends that these conclusions of law are not the correct conclusions to be drawn from the facts, and that the judgment is, therefore, not supported by the findings. It is settled law in this state that an action to quiet title to a parcel of land, may be maintained, notwithstanding the title to the land is still in the government of the United States: Brandt v. Wheaton, 52 Cal., 430; Wilson v. Madison, 55 Cal., 5.

It is also well settled that when a mortgage of land is made, purporting to convey the land in fee, any title afterwards acquired by the mortgagor, will feed the mortgage and inure to the benefit of the mortgagee: Clark v. Baker, 14 Cal., 612; Kirkaldie v. Larrabee, 31 Cal., 455; Sherman v. McCarthy, 57 Cal., 507; and this is so, though the title when the mortgage was made, was in the government and was afterwards acquired by patent from the government: Christy v. Dana, 42 Cal., 174; Camp v. Grider, 62 Cal., 20. The reason for the rule is said in Clark v. Baker, *supra*, p. 633, to be that the relation of the mortgagor is "one which requires him to preserve the property for the purpose of the security for which it was originally pledged; and hence, to insure good faith and fair dealing, he is forever precluded from denying the existence of the lien which he has attempted to create, or defeating its enforcement against the property upon which it was placed."

Counsel for respondent do not question the rule as above stated,

but they insist that it applies only when the outstanding title is acquired by the mortgagor before foreclosure of the mortgage, and that any title acquired by him after foreclosure and sale, is not affected by it. In this counsel are mistaken. In Vallejo Land Association v. Viera, 48 Cal., 572, the same objection was raised, but the ruling was against the views of respondent here. That case was ejectment, and the plaintiff's title to the land involved originated in a sheriff's deed, given after a foreclosure and sale of mortgaged property. At the time of the foreclosure the title was in the government, but it was afterward acquired by the defendant, who had been the mortgagor. The court said: "The rule that a sheriff's deed delivered upon execution sale, imparts no warranty of title, but transfers to the purchaser only such estate as was held at the time by the defendant in execution, has no practical application to a sheriff's deed delivered upon foreclosure of a mortgage in fee; for, as we have seen already, the defendant in the latter case must continue to be estopped, by the terms of the mortgage-deed itself, to deny that the estate was other or less than an estate in fee in the premises. These terms, importing a conveyance of the fee, are equivalent to a covenant of general warranty of title running with the land. We are, therefore, of opinion that the plaintiff is vested with the legal title to the premises in controversy."

But if this be so, counsel still insist that the plaintiff cannot maintain this action for the reason that his mortgage was taken in violation of section 2,296 of the revised statutes of the United States, concerning homesteads, and was, therefore, void and of no effect.

That section reads as follows: "No lands acquired under the provisions of this chapter, shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

The same section was invoked in Kirkaldie v. Larrabee, 31 Cal., 455, to defeat the mortgage then sought to be foreclosed, but it was held not to apply to voluntary conveyances or mortgages in fee. The court said: "There is nothing in the Homestead Act of 1862 forbidding a voluntary alienation by the grantee under that act. The same principle applies to a mortgage of the fee: Clark v. Baker, 14 Cal., 630. The title will pass not merely in consequence of the enforcement of the payment of a debt by the ordinary process of the courts, but in consequence of the voluntary contract of the party in executing the mortgage. The mortgagor of the fee is estopped from denying the existence of the lien which he has attempted to create, and from defeating, by his own act, the enforcement of the lien against the property thus mortgaged."

When the plaintiff's mortgage was executed, the code: C. C. sec. 2,930; provided that "title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt, in like manner as if acquired before the execution." It was a voluntary mortgage in fee, and was not made void or voidable by any provision of the Homestead Act. It follows that the

plaintiff had the right to maintain his action and to have his title to the land in controversy quieted, as against any title which the defendant has acquired or may acquire from the government or otherwise, and that the court erred in rendering judgment for the defendant.

The judgment should be reversed and the cause remanded.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reason given in the foregoing opinion the judgment is reversed and the cause remanded.

No. 9,677.

MOORE *v.* MOORE.

Department One. Filed August 1, 1885.

WHEN THE EVIDENCE IS CONFLICTING the findings will not be disturbed.
REJECTION OF IMMATERIAL EVIDENCE IS NOT ERROR.

APPEAL from a judgment of the superior court of Butte county, entered in favor of the plaintiff and from an order denying the defendant a new trial. The opinion states the facts.

John W. Turner and *Gray & Sexton*, for the appellant.

Reardon & Freer, for the respondent.

FOOTE, C. This cause comes up on appeal from the superior court of the county of Butte.

One brother sued another for money alleged to be due on an account.

The specifications of error set out that the court below found against the evidence, in findings one, two, three, four, six, seven, twelve and thirteen, and that it improperly sustained the plaintiff's objection by his counsel to a question put by defendant's attorney to the plaintiff when on cross-examination as a witness.

The evidence in this case on the trial—a jury being waived—was conflicting throughout, but it was sufficient to sustain the findings of the judge below, who saw the parties, and had a better opportunity than this court can have to judge of their relative merits as truthful and fair witnesses or the contrary. The question put the plaintiff on the stand when on cross-examination—"as to why he did not include something in exhibit B?"—was certainly immaterial to any issue in the case, and the objection to it was properly sustained.

There were other errors complained of but as they were not included in the specifications of error below, they cannot be noticed here.

There being nothing in the record to warrant a reversal of the judgment in this case, it ought to be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

No. 9,554.

SULLIVAN v. MIER ET AL.

Department One. Filed August 1, 1885.

FORECLOSURE OF STREET ASSESSMENT UNDER ACT OF MARCH 16, 1864—PLAINTIFF IN ACTION—JUDGMENT.—Under the act of March 16, 1864, an action for the foreclosure of a street assessment against land in the city of Sacramento, must be brought in the name of the people of the state of California as plaintiffs, and not by the city of Sacramento. If brought in the name of the latter alone, the judgment rendered therein is void, notwithstanding it purports to be in favor of the people of the state of California, as well as in favor of the plaintiff named.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

Jones & Martin, for the appellant.

Wallace & Hastings, for the respondent.

FOOTE, C. In the trial court, the plaintiff, W. L. Sullivan, sued Fred Mier and Conrad Zwickel in an action of ejectment for a lot of land in the city of Sacramento.

The plaintiff introduced in evidence, as part of his chain of title, a judgment roll and a sheriff's deed.

The judgment roll disclosed the fact, that the complaint was filed and summons issued on the twenty-second day of July, 1864; that the action was commenced on that day. The action was for a delinquent street assessment due the city of Sacramento. The law by virtue of which such actions could be brought, is to be found on page 183 of the legislative acts of 1863-4 of date March 16, 1864, so that the action under discussion was, of necessity, governed in its proceedings by the act of March 16, 1864, above referred to.

Upon examination, it is discovered that the provisions of that law required, in all cases, that the complaint should name the people of the state of California as plaintiffs and not the city of Sacramento. It will be found, also, that this act was in relation to suits of a special character, viz.: "For municipal or levee taxes or street assessments:" See section 2 of said act.

The action for delinquent street assessment, by virtue of the proceedings in which and the judgment had and made therein, the plaintiff in the action of ejectment now on appeal here, claimed title to the premises involved in that action, was not brought in the name of the people of the state of California as plaintiffs, but was brought in the name of the city of Sacramento, as the complaint, a part of the judgment roll therein, unmistakably shows; nor does it appear anywhere upon the record that any other party was ever legally joined with the city of Sacramento as plaintiff; the cause then proceeded to judgment, and the judgment or decree of foreclosure and order of sale in the action was entered in favor of the people of the state of California and the city of Sacramento as plaintiffs. If the court which rendered this judgment or decree and order of sale had no jurisdiction to do so, then they were void.

The action was a special one in its nature, and this court said in

Richardson v. Tobin, 45 Cal., 30, which was an action for a street assessment: "The counsel for the defendant also raises the point that it was not within the constitutional power of the legislature to prescribe the requirements of a complaint in this class of actions. But we apprehend the counsel does not seriously urge this point, after the admission in his reply brief that 'after the most thorough investigation of all the works on constitutional law and of the latest digests, there can be found no law limiting the powers of the legislature to regulate the pleadings' in cases like the present."

The law which prescribed in what name such an action should be brought, and which prohibited a certain corporation, viz.: the city of Sacramento, from being named as plaintiff, was constitutional.

But the sixth district court of the state of California, sitting in and for the county of Sacramento, rendered a judgment or decree and order of sale in the tax assessment suit in favor both of the city of Sacramento, which was alone a party plaintiff to the action, and also in favor of the people of the state of California, who never were in any way legally made parties to the suit.

If the judgment, or decree and order of sale had been in favor of the city of Sacramento alone, following the complaint in the action which named said city only as plaintiff, they would have been void, because the court could by law entertain such suit only when brought in the name of the people of the state of California; but it went further; it not only rendered a decree and made an order of sale in favor of the city of Sacramento when it had no jurisdiction of such an action, unless brought in such plaintiff's name, as the act of March 16, 1864, prescribed, it joined in said decree of foreclosure and order of sale, the people of the state of California as plaintiffs, when such plaintiffs have never been made by any legal steps parties to that action. Thus attempting to render a judgment against a defendant in favor of a plaintiff who had never instituted an action against him.

From this it follows that the decree of foreclosure and order of sale, through which the plaintiff claimed title, are utterly void, as is the deed of the sheriff thereunder.

"The purchaser at a sale on execution under a void judgment, finds himself without title:" Freeman on Executions, sec. 20; Emeric v. Alvarado, 64 Cal., 590.

The conveyances which the plaintiff introduced in evidence as *mesne* conveyances subsequent to the void sheriff's deed, of course conveyed no title, being based upon that deed.

There are other errors alleged to have taken place on the trial below, but we need not notice them, since the plaintiff, by his own evidence, has shown his title to have no existence.

The judgment and order denying the motion for new trial in this case ought to be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

No. 9,930.

BARHAM ET AL. v. HOSTETTER.

Department One. Filed August 1, 1885.

ORDER DISSOLVING INJUNCTION—TIME OF APPEAL.—An order dissolving an injunction cannot be reviewed on appeal, unless an appeal therefrom be taken within sixty days.

DAMAGES—INJUNCTION—JOINDER OF CAUSES OF ACTION.—A cause of action for damages which is not joint as to all the plaintiffs, but undoubtedly several, cannot be joined with a cause of action for an injunction which is common to all the plaintiffs.

THE COMPLAINT IN THIS ACTION HELD AMBIGUOUS, UNINTELLIGIBLE, AND UNCERTAIN, for insufficient description of the property, alleged to be affected by the acts of the defendant.

APPEAL from a judgment of the superior court of Lassen county, entered in favor of the defendant. The opinion states the facts.

E. V. Spencer, for the appellant.

A. L. Shinn and *J. D. Goodwin*, for the respondent.

FOOTE, C. This was an action brought by eleven plaintiffs to restrain an alleged diversion of the waters of a certain creek, by the defendant, and for damages for such alleged diversion.

The appeal is prosecuted from the judgment of the trial court in dismissing the action, and from an order dissolving a preliminary injunction.

The judgment-roll discloses that a demurrer was interposed to the complaint, and that it was sustained, and the plaintiffs declining to amend upon leave given, the action was dismissed with costs against plaintiffs.

The judgment of dismissal was made on the fourth day of October, 1884, leave to amend for twenty days having been previously given on the twenty-first day of July, 1884.

The preliminary injunction was dissolved on the third day of June, 1884, and the appeal from the judgment and order was not taken until the twenty-second day of January, 1885.

The order dissolving the injunction cannot be reviewed here, as the plaintiffs did not take an appeal from that order until far more than sixty days had elapsed: C. C. P. sec. 956; McCourtney v. Fortune, 42 Cal., 387.

The only questions then left for discussion, are those underlying the judgment of dismissal of the action;

Unless the demurrer to the complaint ought to have been overruled, this judgment was undoubtedly right, for the plaintiffs did not avail themselves of the ample opportunity to amend their complaint granted them by the court on sustaining the demurrer.

The grounds on which the demurrer was sustained are as follows:

1. That there was a misjoinder of causes of action.

2. That the complaint was ambiguous, unintelligible and uncertain; for the reason that the real estate and ditches of the plaintiffs were not described with sufficient certainty; and that it did not appear which of two plaintiffs named Barham were interested in ditches Nos. 10, 11 and 12, as set out in the complaint.

The purpose for which the action was instituted, as appears from the body and prayer of the complaint, was to restrain the defendant from depriving the several plaintiffs of water for irrigation purposes, carried by various ditches to certain distinct parcels of land owned, not jointly but separately, by different plaintiffs, and to recover five hundred dollars damages alleged to have been done to the plaintiffs in the aggregate.

One plaintiff was alleged to be the sole owner of sixty acres of land affected by the deprivation of water caused by the defendant's acts. Two plaintiffs alleged to be joint owners of forty acres, one plaintiff to be the sole owner of sixty acres, another sole owner of sixty acres, another of one hundred acres, another of twenty acres, one of forty acres, two as joint owners of forty acres, and another as sole owner of one hundred acres.

The damages claimed in an aggregate sum for all the plaintiffs jointly, was five hundred dollars.

The cause of action for damages is not joint as to all the plaintiffs, but undoubtedly several; it is joined with a cause of action for an injunction which is common to all the plaintiffs; hence the demurrer upon this point was properly sustained.

"There is no more a common interest than though a carrier had at one time carelessly destroyed property belonging to different persons:" Bliss on Code Pleading, sec. 76.

The plaintiffs set out in the complaint the number of acres of land they each own; that these lands join each other, and constitute one body of land, and that said land is situated on Baxter creek, and in Lassen county, Cal.

From this description an ordinary inquirer after these lands would be likely to travel up and down Baxter creek for many days and still be left in the most painful uncertainty as to their exact location; and when it comes to the description of the ditches as set out in the complaint, it is hard to believe that even a professional surveyor could ever successfully locate them.

In the complaint there are mentioned as plaintiffs, Messrs. T. M. Barham and Charles Barham, and a man named Barham is declared to be a joint owner of ditch No. 10, with other plaintiffs, not named Barham, and ditches 11 and 12 are declared to be owned by plaintiffs Dunn and Barham jointly, but as there are two Barhams named as plaintiffs, and the pleader did not deem proper to state which of the two, whether T. M. or Charles Barham, had any interest in those ditches, it is not surprising that as to that matter both the court below and the defendant were left in ignorance.

We are of opinion that the court was entirely justified in sustaining the demurrer to the complaint and in dismissing the action.

For these reasons we think the judgment and the order dissolving the preliminary injunction ought to be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

No. 9,778.

JUNKANS v. BERGIN ET AL.

Department One. Filed August 1, 1885.

APPROPRIATION OF WATER—EVIDENCE.—The evidence as to the quantity of water the plaintiff had the right to appropriate reviewed, and the finding thereon held sustained by the evidence.

THE SAME—POINT OF DIVERSION MAY BE CHANGED.—One having a prior right to divert a given quantity of water from a certain stream, may take the same at any point on the stream, and may change the point of diversion at pleasure, if the rights of other appropriators be not injuriously affected by the change.

THE SAME—WRONGFUL DIVERSION.—Upon a review of the evidence *held*, that the defendants had diverted a portion of the water to which plaintiff was entitled, and thereby did him damage.

APPEAL from a judgment of the superior court of Trinity county, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

J. W. Philbrook and *Hatch & Chadbourne*, for the appellant.

W. J. Tinnin and *John C. Burch*, for the respondents.

BELCHER, C. C. This is an action to recover damages for the diversion of water, and for an injunction.

The case was tried by the court and judgment rendered in favor of the defendants.

The plaintiff then moved for a new trial, which was denied, and the appeal is from the judgment and from the order denying the new trial.

It appears that the plaintiff owned two ditches in Trinity county, one known as the Perkins bar ditch and the other as the Evans bar ditch, which took water from Perkins creek and conducted it to Perkins bar, in the Trinity river, where it was used for mining. Perkins creek had a tributary known as Maple creek, and the defendants had two ditches, one known as the Hop Lee ditch and the other as the Fronte ditch, which took water from Perkins creek and conducted it to a point on Maple creek, where it was used by them in mining.

The Perkins bar ditch had the oldest water right, and took its water from Perkins creek, about half a mile above the mouth of Maple creek. The Evans bar ditch had the next oldest water right, and up to 1882 took its water from Perkins creek, just below the mouth of Maple creek. In that year the dam, which turned the water into the ditch, was so filled up with tailings, which the defendants, by their mining operations on Maple creek, caused to flow down that creek, that it became very difficult and expensive to maintain it so as to keep the water flowing into the ditch, and the plaintiff then moved his dam up Perkins creek to a point about fifty feet above the mouth of Maple creek.

The defendants' ditches were constructed after the plaintiff's ditches, and took water from Perkins creek above the head of the Perkins bar ditch. The defendants and their grantors had been using their ditches to conduct water from Perkins creek to their

mines on Maple creek since 1877, till they were stopped from so doing by the temporary injunction issued in this case.

1. The court found the capacity of the Perkins bar ditch to be two hundred and forty-seven and one-half inches of water, delivered under a five-inch pressure, and that, as appurtenant to that ditch, the plaintiff had the first right to take that quantity of water from the creek.

The appellant claims that the quantity of water allowed for his Perkins bar ditch is too small and that the finding limiting it to the quantity named is not supported by the evidence.

It is not easy to see just how the court found the exact figures named, but we think there was a substantial conflict of the evidence upon the subject. The complaint alleges the capacity of the ditch to be three hundred inches under a four inch pressure. The plaintiff testified that its capacity was from three hundred to four hundred inches, without naming the pressure. One of his witnesses, who was a civil engineer, testified that he measured it on the twenty-eighth of February, 1884, and that the capacity of the ditch when "as full as it could carry," was three hundred and sixty inches under a four inch pressure.

For the defense, the respondent, Bergin, testified that the ditch was enlarged in its capacity one-third in the fall of 1882, and that he first learned its capacity in 1880, and would judge it to be from one hundred and fifty to one hundred and sixty inches. Another witness for the defense testified that the ditch was enlarged in 1882 so that it would probably carry one hundred or one hundred and twenty-five inches more than it would when he first knew it in 1881, and that when he first knew it its capacity was from one hundred and fifty to two hundred inches, though he never measured it exactly.

There is no denial on the part of the plaintiff that the ditch was enlarged in 1882, and looking at all the testimony upon the subject it would seem that the finding was quite as favorable to the plaintiff as he was entitled to have it.

2. The court found that in 1882 the Evans bar dam was destroyed by tailings sent down by the mining operations of the defendants, and the plaintiff in that year removed his dam or rather constructed a dam in place thereof on Perkins creek, about fifty feet above the mouth of Maple creek, and diverted water therefrom into his Evans bar ditch, and as a conclusion of law that the plaintiff by permitting the defendants to destroy his dam on Perkins creek, below the mouth of Maple creek, known as the Evans bar dam, and by erecting in place thereof a new dam on Perkins creek, above the mouth of Maple creek, lost his prior rights as against the defendants to the water of Perkins creek, which he had acquired by the construction of the Evans bar dam and ditch.

The appellant claims this finding and conclusion to be against law.

The appellant's ditch had capacity to carry seven hundred inches

of water, delivered under a five-inch pressure. Up to 1882, its head dam being below the mouth of Maple creek, it took the waters of both creeks. To the extent of its capacity the appellant, being the first appropriator, had the right to have all those waters flow into his ditch. But, subject to that right, the respondents might lawfully divert the water from Perkins creek and use it on Maple creek: Union Water Co. v. Crary, 25 Cal., 504. This they had been doing for several years, and it is not alleged that its quantity was diminished or its quality deteriorated. They had no right, however, by their mining operations, to destroy or to fill up the appellant's dam or ditch, or to materially diminish the quantity or deteriorate the quality of the water, and if they did that, an action might have been maintained against them for damages and to restrain their works: Hill v. King, 8 Cal., 336; Hill v. Smith, 27 Cal., 476.

Instead of resorting to such an action the appellant moved his dam to a point above the mouth of Maple creek where it was impossible to divert the waters flowing down that creek into his ditch, and now seeks to restrain the respondents from diverting water from Perkins creek and damages for past diversions. Undoubtedly one entitled to divert a quantity of water from a stream may take the same at any point on the stream and may change the point of diversion at pleasure, if the rights of others be not injuriously affected by the change: Kidd v. Laird, 15 Cal., 161.

Here the rights of the respondents might be injuriously affected by the change if this action could be maintained. We think the appellant has mistaken his cause of action and that the findings in this respect are not obnoxious to the objections urged.

The court found that "defendants have at all times respected the prior rights of plaintiff to the two hundred and forty-seven and one-half inches of the first flow of the waters of Perkins creek, and have not, nor has either of them, at any time, deprived the plaintiff or his said ditch of any portion of said two hundred and forty-seven and one-half inches of water to which he had a prior right, nor have they or either of them in anywise interfered with or trespassed upon said plaintiff's prior right to said two hundred and forty-seven and one-half inches aforesaid, or any part thereof, nor threatened so to do." And it further found that "plaintiff has not been damaged by any acts of the defendants, or either of them, in the sum of one thousand dollars, nor in any other sum of money, or at all." The appellant claims that these findings are not supported by the evidence, while the respondents insist that there was a substantial conflict in the evidence upon the subject.

On looking at the evidence, we find that the appellant, speaking of his Perkins bar ditch, testified: "Since I bought it, water has been running in it steadily, except when turned out to clean the ditch, and several times when it has been taken from me; Bergin and Fronte, defendants, took it; they took it two years ago. It was turned back after I notified them not to take it; * * * did not allow me one-quarter of what my ditch was entitled to. My ditch

was left only about three inches in the flume. They kept the water during the mining season so long as they mined there, then they gave it up. This water was worth to me from two dollars to four dollars per sluice head per day. Again last fall they took the water from my ditch; it might have been partly in December. When there was plenty of water in the creek they would use most of it and claim that I was only entitled to forty-three inches. They retained the water that time until I sued out an injunction in this action. * * * A sluice head is thirty-six inches." And on cross-examination, he testified: "When defendants were diverting water from the Perkins bar ditch, the amount they took was one-half the quantity that ditch would carry. That ditch was not half-full. I went and measured, and there was only two and one-half inches in our flume." In answer to this, respondent Bergin testified: "In taking water in the Hop Lee and Fronte ditches I have not turned in any water, except where there was water flowing by the dam which diverts it into Perkins bar ditch."

This is all the testimony cited by respondents to show a conflict, and all, after a careful reading of the transcript, that we have been able to find. Does this show a substantial conflict? It must be noted that the witness does not say that he always allowed water enough to flow by the head of his ditches to fill the plaintiff's ditch, nor does he name any quantity that he allowed to pass. His statement simply is that he never "turned in" any water when there was not water flowing by the plaintiff's dam. This might be literally true, even though after he had turned it in, there was not water enough left in the stream to half fill the plaintiff's ditch.

It should also be noted that in their answer the defendants deny that the plaintiff's ditch has the capacity to carry, or the right to divert, any greater quantity of water than one hundred and seventy-four inches, delivered under a five-inch pressure, and that one of the defendants' witnesses, who had been their ditch-tender, testified that he "always allowed to Perkins bar ditch from one hundred and fifty to one hundred and sixty inches."

The appellant was entitled at all times to take from the stream two hundred and forty-seven and one-half inches of water delivered under a five-inch pressure, and it is clear from his testimony that the respondents did not always respect his rights, but diverted a portion of that water from him and thereby did him damage. The testimony of respondents in answer to this was evasive and did not, we think, create a substantial conflict.

For the reasons last stated the judgment and order should be reversed and the cause remanded for a new trial.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

WEST COAST REPORTER.

WHOLE NO. 86. AUGUST 20, 1885. VOL. VII. NO. 6.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SHARON *v.* HILL.

[In the matter of the report of the examiner in chancery in relation to proceedings on the examination of witnesses, August 3, 1885.]

August 5, 1885.

THE JURISDICTION OF THE UNITED STATES COURTS, of offenses committed in places in California purchased by the United States, by the consent of the legislature of the state, for a custom house, and other needful buildings, and used for such buildings, is exclusive.

DEADLY WEAPONS—CONTEMPT AND OFFENSES.—The drawing of a pistol, and threatening the lives of counsel, in the presence of an examiner in chancery while taking testimony in an equity case, pending in the United States circuit court, in the chambers of the judge adjoining the court room, situate upon land thus under the exclusive jurisdiction of the United States, is both a contempt of court, punishable as such, and an offense under the statutes of the United States, punishable on indictment, or information.

CONTEMPT OF COURT—OFFENSES UNDER THE STATUTE.—Where the same acts constitute offenses against the United States, punishable upon information, or indictment, and at the same time a contempt of court, punishable as such, and there is no special end, in the administration of justice, to be accomplished by proceeding, summarily, on process for contempt, the court may waive the process for contempt, and leave the government to proceed to punish the offense under the statute.

ARMED ATTORNEYS.—The going into court, by members of the bar, armed with deadly weapons, characterized as not only a contempt of court, but, also, *professional misconduct*, that ought to be punished by suspension from practice or disbarment.

On August 4, 1885, before FIELD, Circuit Justice, and SAWYER, Circuit Judge, the examiner in chancery appointed in this case to take the testimony of witnesses made the following report to the court:

THE EXAMINER'S REPORT.

In the circuit court of the United States, for the ninth circuit and district of California:

WILLIAM SHARON
v.
S. A. HILL. } No. 3,138.

To the honorable, the circuit court of the United States, for the ninth circuit and district of California:

I, the undersigned, examiner in chancery of said court, conforming to the request of counsel for complainant in the above entitled cause, do certify:

At a regular session of the examination in the above entitled cause on the third day of August, 1885, at my office in the ap-

praisers' building, San Francisco, California, being the time and place to which said examination was regularly adjourned, there were present William M. Stewart, Esq., and Oliver P. Evans, Esq., of counsel for complainant; W. B. Tyler, Esq., of counsel for respondent; the respondent *in propria persona*, and R. U. Piper, recalled as a witness on behalf of complainant in rebuttal.

During the examination of said Piper, the respondent, who was sitting at the table engaged in reading a deposition of Susan Elizabeth Smith, made herein, became apparently much excited. Following is a transcript setting forth a portion of the proceedings taken from the notes of the reporter:

The Respondent—I won't sign my deposition unless it contains everything that I said about Stewart's family. He don't dare to take me up on it. I won't sign that evidence unless that is put in.

The Examiner—Don't talk about it now.

The Respondent—It has got to go in.

The Examiner—This is no proper time for bringing up any matter of that kind. A witness is under examination.

The Respondent—When I see this testimony, I feel like taking that man Stewart out and cowhiding him. I will shoot him yet; that very man sitting there. To think he would put up a woman to come here and deliberately lie about me like that. I will shoot him. They know when I say I will do it that I will do it. I shall shoot him as sure as you live; the man that is sitting right there; and I shall have that woman, Mrs. Smith, arrested for this, and make her prove it.

The Examiner—Those are not matters which should be brought up now. Don't talk in this way when a witness is under examination.

The Respondent—I say no jury will convict me for shooting a man that will bring a woman here to tell such things on me. They have never dared, when they put me on the stand, to ask me a question against my character yet; never dared, if they have got so much against it, why didn't they dare ask me some questions when I was on the stand?

The Examiner—Mr. Tyler, can you put a stop to this interruption?

The Respondent—Mrs. Smith said nothing here about my being in a weak condition in Dr. Murphy's office,—that has been put in the testimony—and that I wanted her to play nurse to me. She was a nurse to me, and I paid her for it.

The Examiner—Mr. Tyler, can you put a stop to this? I find that I cannot, and unless you can, I shall have to adjourn the examination and bring this matter to the attention of the court. This thing has gone altogether too far already, and unless it can be stopped here, I certainly shall adjourn the examination.

Mr. Tyler—Let us get through this afternoon, anyway.

The Respondent—I know the woman he is living with, and he brought his wife out here to cover it up. I will expose the whole thing, about the child and all.

The Examiner—Will you remain quiet until this examination is completed?

The Respondent—I don't know whether I will remain quiet without I get that man's life. I get so worked up when I read this testimony of Mrs. Smith.

The Examiner—Let me take that testimony until after the examination is over.

The Respondent—I expect you had better.

The Examiner—You may finish reading Mrs. Smith's testimony after the close of the session. I hope, now, I shall not be compelled to bring your misbehavior to the attention of the court, for if I should do so, the court will surely punish you for contempt.

The Respondent—That would be nothing unusual if Stewart asked it.

The Examiner—I shall ask it in this instance, because my duty compels me to do so. You persist in interrupting the proceedings, and it is impossible for the examination to go on. If you will wait until we get through with this examination, if you have anything to say, then it will be a more appropriate time to say it.

The Respondent—I can hit a four-bit piece nine times out of ten.

The Examiner—If you interrupt the proceedings any further, I shall adjourn the examination and call the attention of the court to this matter, and it won't be my fault if the court does not take such measures as will put a stop to such interruptions. I have at all times been disposed to be as tolerant and lenient with you as possible, but toleration should have a limit, and the limit has been reached. Early in the proceedings the court suggested that I ought to be very lenient with you, and, in conformity to that suggestion, as well as from my own inclination, I have treated you with the greatest consideration and forbearance all through.

The Respondent—That is enough; you needn't say anything more.

The Examiner—But I propose to say something more.

The Respondent—All right; then I'll talk.

The Examiner—Since the commencement of the examination in this case, your offensive conduct has frequently disturbed the orderly course of the proceedings, and I have tried in every way which my imagination could suggest to check you—by considerate treatment, by ignoring your misbehavior, by courteous protest and persuasion, by rebuke, by appeals to your counsel, by threatening to report your conduct to the court. But, instead of abating, the evil is constantly growing worse. Now this thing must stop.

The respondent ceased speaking at this point, and the examination proceeded.

In addition to the above-quoted remarks of respondent, she made further statements defamatory of the character of people not connected with the case, which remarks are deemed not necessary to be repeated in this report.

The examination of the witness Piper having been concluded, Victor Craig was recalled as a witness on behalf of the complainant in rebuttal. Pending his examination, the respondent drew a pistol

from her satchel and held it in her right hand, the hand resting for a moment upon the table, with the weapon pointed in the direction of Judge Evans, the hand and weapon being then dropped to her lap, beneath the table. At this time Mr. Stewart had left the room. Judge Evans, noticing the action of the respondent, said:

"What do you want? Do you want to shoot anybody?"

The Respondent—I am not going to shoot you just now, unless you would like to be shot, and think you deserve it.

Mr. Evans—No; I would rather not be.

The Examiner—Unless you will give that pistol into my custody I shall adjourn the examination and report this matter to the court.

The Respondent—I am not going to shoot anybody. I will give it into your custody.

The Examiner—I will adjourn this examination until to-morrow. Won't you give me that pistol?

The respondent complied with the request and allowed the examiner to take her pistol.

Mr. Evans—We don't desire to proceed any further, under the the circumstances. We ask that this matter be reported to the court.

The Respondent—You shall not slander me. These men know they need it, and I told the supreme court they knew they needed it.

Mr. Evans—I shall decline to proceed any further.

The examination was adjourned by the examiner to August 4, 1885, at ten o'clock A. M.

It may be proper to add that upon previous occasions respondent has brought to the examiner's room, during the examination, a pistol, and has sat for some length of time holding it in her hand, to the knowledge of all persons present at the time.

Respectfully submitted,
S. C. HOUGHTON, Examiner, etc.

On August 5, the report was considered by the court, Mr. Justice Field, and Sawyer, circuit judge, being present.

William M. Stewart and *Oliver P. Evans*, for complainant.

W. B. Tyler, for defendant.

FIELD, CIRCUIT JUSTICE. In the case of William Sharon v. Sarah Althea Hill, the examiner in chancery, appointed to take the testimony, has reported to the court that very disorderly proceedings took place before him on the third instant; that at that day, in his room, when counsel of the parties, and the defendant were present, and during the examination of a witness by the name of Piper, the defendant became very much excited, and threatened to take the life of one of the counsel, and that, subsequently, she drew a pistol, and declared her intention to carry her threat into effect. It appears, also, from the report of the examiner, that, on repeated occasions, the defendant has attended before him, during the examination of witnesses, armed with a pistol. Such conduct, is an offense against the laws of the United States, punishable by fine and imprisonment. It interferes with the due order of proceedings in the administra-

tion of justice, and is well calculated to bring them into contempt. I, myself, have not, heretofore, sat in this case, and do not expect to participate in its decision; I intend in a few days to leave for the east, but I have been consulted by my associate, and have been requested to take part in this side proceeding, for it is of the utmost importance for the due administration of justice, that such misbehavior, as the examiner reports, should be stopped, and measures be taken, which will prevent its recurrence. My associate will comment upon the laws of congress, which make the act committed by the defendant, a misdemeanor, punishable by fine and imprisonment.

The marshal will be directed to disarm the defendant, whenever she comes before the examiner, or into court in any future proceedings, and to appoint an officer to keep strict surveillance over her, in order that she may not carry out her threatened purpose.

This order will be entered.

Whereas, it appears from the report to this court of the examiner in chancery, in this case, appointed to take the depositions of witnesses, that on the third day of August instant, at his office, counsel of the parties appeared, namely, William M. Stewart, Esquire, and Oliver P. Evans, Esquire, for the complainant, and W. B. Tyler, Esquire, for the defendant, and the defendant in person, and that during the examination before said examiner of a witness named, Piper, the defendant became excited and threatened the life of one of the counsel of the complainant present, and exhibited a pistol with a declared purpose to carry such threat into effect, thereby obstructing the order of the proceedings and endeavoring to bring the same into contempt.

And whereas, it further appears, that said defendant habitually attends before the said examiner carrying a pistol, it is ordered, that the marshal of this court take all such measures, as may be necessary, to disarm said defendant, and keep her disarmed, and under strict surveillance whilst she is attending the examination of witnesses before said examiner, and whenever attending in court, and that a deputy be detailed for that purpose.

Mr. Clerk, enter the order.

Mr. Justice Sawyer will explain for the benefit of counsel the statutes of congress. It is to be observed here that the block, embracing this building and the custom-house, is under the exclusive jurisdiction of the United States. Every offense committed within it, is an offense against the United States, and, here, the state has no jurisdiction whatever. This fact seems to have been forgotten by parties.

SAWYER, CIRCUIT JUDGE. The occasion, I think, calls for some observation on my part, in regard to this matter.

The taking of testimony in this case has been going on for a long time. During the progress of the case, many things had occurred, that were exceedingly unpleasant, but through the considerate and

commendable forbearance of the examiner, and of counsel, a point had been reached where the testimony was nearly completed, and it was hoped would soon be closed without further interruption, when the incident occurred, which imperatively required this report from the examiner. The occurrence is one of great gravity. The lives of officers of the court, in attendance before a branch of the court, in the performance of their duties as counsel, being in danger, the examiner justly felt, that he could no longer refrain from reporting the action of the defendant without a violation of official duty.

In connection with this matter, I shall call attention to some facts and some points of law, that may not be within the knowledge of the party implicated, and may even have escaped the notice of counsel, in order that such offenses against the laws of the United States, may not in future be, ignorantly, committed. Of course, we are all familiar with the maxim, that everybody is supposed to know the law, yet, in point of fact, it often occurs, that many do not. I shall, therefore, proceed to state some provisions of the statutes in relation to transactions of the kind reported, that may not have attracted notice, in order to guard against any such future misconduct, as will lead to serious difficulties, and necessitate severe punishment.

As was remarked by the presiding justice, this building is under the exclusive jurisdiction of the United States. The block on which it stands, has been purchased by the United States, from the state of California, by the consent of the legislature, for the erection of the public buildings upon it; and it is by the constitution thus placed under the exclusive jurisdiction of the United States. All offenses committed in this edifice, or upon the block of land upon which it stands, are offenses against the United States, punishable exclusively by the national courts. This point was authoritatively decided at the last term of the supreme court of the United States, in the case of The Fort Leavenworth R. R. Co. v. Lowe, 114 U. S., 525.

Every offense recognized by law, from the highest down to a simple assault, committed in this building, or on this block, is an offense against the United States, and punishable as such by the courts of the United States. The United States statutes have not defined, specifically, in terms, every offense, but they have defined a number of the graver class, and then made a general provision covering all others.

Section 5,391 of the revised statutes, provides, as follows: "If any offense be committed in any place, which has been, or may hereafter be, *ceded to and under the jurisdiction of the United States*, which offense is not prohibited, or the punishment thereof is not, specially, provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the state in which such place is situated, now in force, provide for the like offense, when committed within the jurisdiction of such state."

Thus, an act not, specifically, made an offense, by the statutes

of the United States, but which is an offense under the laws of the state, wherein performed, is made, by this general provision, also, an offense under the laws of the United States, and punishable by the same penalties, which are inflicted under the laws of the state.

Under the provisions referred to, the acts, as reported by the examiner in this case, constitute, at least, two if not three, offenses against the United States—perhaps four.

Section 5,399 (omitting that portion relating to other matters) provides as follows: "Every person who by threats endeavors to influence, intimidate or impede any officer in any court of the United States, in the discharge of his duty, or by threats or force obstructs or impedes or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both."

In this matter as reported by the examiner, there was an obstruction of an officer—the examiner in chancery of this court, and of counselors of the court, who are officers of the court, in the discharge of their respective duties, and, also, an impeding of the due administration of justice. The obstruction resulted in an adjournment of the examination, as neither counsel nor examiner were willing to proceed in face of the menace offered to counsel accompanied by the exhibition of a pistol by the defendant in the suit.

Again, the penal code of this state makes the following provision, and the general statute, which I have read, making all offenses in the state, which are not, specifically, defined in the statute of the United States, offenses against the United States, and punishable by the same penalty, as in the state, makes this an offense against the United States.

Section 417 of the penal code of California provides that: "Every person who, not in necessary self-defense, in the presence of two or more persons, draws or exhibits any deadly weapon in a rude, angry and threatening manner, or who, in any manner, unlawfully uses the same, in any fight or quarrel, is guilty of a misdemeanor."

Another section provides that the punishment for misdemeanors, nor otherwise, specially, provided for, shall be by imprisonment in the county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or both:" Political code, sec. 19.

Again, section 467 of the penal code of California provides as follows: "Every person having upon him any deadly weapon, with intent to assault another, is guilty of a misdemeanor."

And there are various other cognate offenses, all of which, are offenses against the United States, by adoption, in the section which I have already read.

As before remarked, every offense which is committed in this building, or on this block, from the highest down to an assault, is an offense against the United States, exclusively punishable by the courts of the United States, and attention is called to this, so that parties may not, in future, unwittingly commit any of these of-

fenses, and subject themselves to the penalties inflicted by the law.

This report of the examiner having been made, it imperatively calls for some action by the court. It cannot be passed unnoticed. It is proper to observe that connsel for the opposing party have exhibited great moderation, and have only sought the protection of their lives; they have not asked the court to proceed to punish defendant for the contempt committed. They only ask, and it is, certainly, a very moderate and reasonable request, that they shall not be required to practice their profession in the circuit court of the United States, at the muzzle of their opponent's pistols. The court, of its own motion, the matter having been brought to its attention, might well proceed upon the case as reported, as a gross contempt of court. It is, unquestionably, a contempt. It is a contempt committed before an officer, lawfully taking testimony in this case, the proceeding being a part of the trial of the case, in the chambers of the judge, adjoining the court room, the examiner being an adjunct of the court—a part of the court itself. This act reported, is, undoubtedly, as distinctly and clearly a contempt of court, as though committed in the presence of the judge, in the court room, while in the act of trying a case, either with or without a jury. This point is well discussed by Judge Hammond, of the district of Tennessee, in U. S. v. Anonymous, a case of much milder type of contempt, 21 Fed. Rep., 761.

But these same acts, which constitute a contempt in this case, also constitute several offenses under the laws of the United States, punishable in the ordinary course of criminal proceedings.

There are but two objects of proceeding by process for contempt. One is, to punish a contempt already committed, as a past offense, where, perhaps, the criminal statutes do not cover the case, or, in some cases, where it does, but where the exigencies of the occasion require a more summary, and prompt remedy; snd the other object is to enforce the performance of some duty, or act, which, is, still in the power of the party to perform.

So far as future action is concerned, we have endeavored to provide for the safety of counsel, by the order which we have just made, requiring the marshal to see that the defendant does not enter the room of the examiner, or the chambers of the judge, or the court room, while armed; and, also, by calling attention to the liability to criminal punishment for other similar acts that may be performed in the future.

As to the past offense, we might well proceed to punish the acts reported, as a gross contempt of court. But, where the same acts constitute both a contempt of court, which could be punished as such—that is to say, as a past contempt—and at the same time constitute an offense against the laws of the country, which may be punished on indictment, or information,—though sometimes it is necessary to promptly vindicate the court by means of the more summary process for contempt,—as a general rule, it is desirable to proceed criminally, if in the ordinary exercise of the criminal jurisdiction

of the court, it can just as well be done. In such cases, where there is no special end, in the administration of justice, to be attained by a proceeding for contempt, it is deemed better, to adopt the more deliberate, mode of procedure applicable to the enforcement of the criminal laws of the country. We have not been asked to proceed by process of contempt, and as there appears to be no special call for hasty action, we deem it advisable, under the circumstances of this case, to proceed in the more deliberate, careful, and less harsh proceeding, under the charge of the government, than to proceed by process for contempt. We shall, therefore, waive the process for contempt; and the attention of the United States attorney having now here been called to the breach of the laws, as reported by the examiner, we shall leave the matter to such course of proceeding as he may deem it his duty to take, to enforce the criminal laws of the country.

Immediately after the announcement of the decision, the following colloquy occurred, illustrating the views of the court, as to the character of the professional conduct of members of the bar who enter the temple of justice armed. It is deemed of sufficient importance to the public, and the bar, to justify appending it, as a note, to the decision.

Mr. W. B. Tyler—If the court please, of course I deprecate any such acts as those in the court-room, or in the examiner's office, as much as anybody; but I would suggest that there be an addition made to that order of the court, and that is, that nobody be allowed to enter that room armed, during the progress of this examination. I think it is necessary, I think it is proper, and there is no more reason—

Justice Field—We have no evidence that anybody has gone into the room armed. We have only made a rule to apply to what is brought to our knowledge.

Mr. Tyler—As his honor, Judge Sawyer, remarked, several very unpleasant things have occurred in there that perhaps your honor has no more evidence of—

Justice Field—I know nothing of them, of course.

Judge Sawyer—We considered that matter, to which you refer, Mr. Tyler, and we had no evidence of anything of that kind. Nobody but counsel could be guilty of any such breach of propriety. And after calling attention to the statutes of the United States, and to the fact that carrying arms for an unlawful purpose, is an offense against the statutes, we hardly expect, that any member of the bar of this court will presume to enter the examiner's room, or the court-room, armed. We cannot presume, that members of the bar will be guilty of any such professional misconduct.

Justice Field—I may add here, further, that any lawyer who so far forgets his profession as to come into a court of justice armed, ought to be disbarred from practice.

Mr. Tyler referred to witnesses as being sometimes armed.

Judge Sawyer—Witnesses, it is true, may come into court armed; but with the admonition we have given, and as there has been no evidence that witnesses have come before the examiner armed, we think it hardly advisable, to anticipate any difficulty in that direction. We apprehend that witnesses will be likely, hereafter, to conduct themselves with propriety.

Mr. Tyler—I would say to his honor, Judge Field, that although I thoroughly concede everything he says in certain instances, yet, where a lawyer has information that a witness will come armed, he will very likely do as I myself have done—come armed, to protect himself.

Justice Field—Then you would act very improperly. You should report the fact to the court and let the man carrying arms be arrested.

Judge Sawyer—When you have any such information, you should have the party put under bonds, or apply to the court in advance for protection.

Justice Field—Any man, counsel or witness, who comes into a court of justice armed ought to be punished, and if he is a member of the bar, he ought to be suspended or removed permanently. That is the doctrine that ought to be inculcated from the bench everywhere. So far as I have the power, I will enforce it.

Mr. Tyler—So should I enforce it.

Justice Field—The reason that you give for carrying arms in court is not a good reason.

Mr. Tyler—Where witnesses do come armed—

Justice Field—Then report the fact to the court; that is the proper way.

Mr. Tyler—That will not stop a bullet.

Judge Sawyer—Then arrest the parties in advance, and put them under bonds, or apply to the court to have them examined and disarmed before permitting them to enter the court. The laws are very severe.

Mr. Tyler—The laws are very severe, but it is harder on the man that gets the bullet.

Justice Field—I don't mean to say that there may not be times in the history of a country, in certain communities, when everybody is armed. That was the case in the early days of California, when people traveled armed; but at this time, when law is supposed to be supreme, when all good men are supposed to obey it, and where counselors are sworn to obey the law and to see it properly administered, the carrying of arms into a court cannot for a moment be tolerated.

Mr. Tyler—Your honor will excuse me one minute, as this is a personal matter, and a little personal reflection on myself, in view of another proceeding which has taken place.

Justice Field—I know nothing of any other proceeding—

Mr. Tyler (interrupting)—But as you have expressed your opinion that a lawyer who, under any circumstances, should come into a

court of justice armed, should be disbarred, and that was my exact case, I, certainly, have a right to explain that circumstance. During the trial of a case in the superior court—

Justice Field—We do not care about hearing of that. We cannot go into that matter at all.

Mr. Tyler—Don't you consider, that to make that assertion, as an absolute assertion, when it applies directly to a member of the bar of this court, and has nothing to do with this matter, that the member may answer? You have made that assertion, and I went into a court room armed with a pistol, for the purpose of preserving, as I supposed, my father's life and my own; and now I make the explanation.

Justice Field—It is not worth while to pass any words with the court. We do not take our rules of procedure from the state courts, and if any lawlessness is permitted there, we should not be governed by that fact. I trust I never shall be called to preside over a federal court, where any lawyer will presume to come into it armed, and if he does, I shall exercise such authority as is vested in me to prevent it. Whatever may have been done in a state court, I know nothing about.

CIRCUIT COURT, DISTRICT OF OREGON.

FARMERS' LOAN AND TRUST COMPANY *v.* OREGON AND CALIFORNIA RAILWAY COMPANY.

August 3, 1885.

"SUBJECT" OF AN ACT AND "MATTER PROPERLY CONNECTED THEREWITH"—TWO-COUNTY MORTGAGE VOID.—The clause in sec. 3 of the act of October 26, 1882, Ses. Laws, 65, commonly called "the mortgage tax law," which declares that all mortgages or other obligations whereby land in more than one county "is made security for the payment of a debt, shall be void," is a "matter properly connected" with the "subject" of the act, and, therefore, not in contravention of sec. 20 of article iv. of the constitution of the state; and a mortgage executed by the defendant to the plaintiff, as trustee, of its road and property in several counties in Oregon, to secure the payment of certain bonds of the same date, in violation thereof, is void and of no effect.

CONSTRUCTION OF STATUTE.—A plain provision of a statute cannot be construed so as to exclude a particular case from its operation upon a surmise or conjecture, however probable, that the legislature did not actually contemplate or consciously intend its application thereto.

INSTALMENT OF INTEREST—LIEN OF MORTGAGE MAY BE ENFORCED FOR.—When a debt payable at a future day, with interest payable in the meantime, at stated intervals, is secured by mortgage, and default is made in the payment of an instalment of such interest, a suit in equity may be maintained to enforce the lien of such mortgage, so far as such instalment is concerned, by a sale of so much of the mortgaged property as may be necessary to pay the same; but if such property cannot be sold in parcels without injury to the parties, or one of them, then the court may order the whole of it sold, free from the lien of the mortgage, and apply the proceeds on the whole debt according to its then value.

SUIT to enforce the liens of mortgages. The opinion states the facts.

William B. Gilbert, for the plaintiff.

Richard Williams and *James K. Kelly*, for the defendant.

DEADY, J. This suit is brought by the Farmers' Loan and Trust Company, a corporation formed under the laws of New York, against the defendant, a corporation formed under the laws of Oregon, to enforce the lien of two certain mortgages on the property of the defendant, by a sale of the same, and to have the proceeds thereof applied on the several bonds secured thereby, according to their priority.

The bill was filed on January 29, 1885, and states, among other things, that on June 1, 1881, the defendant executed and delivered to Henry Villard, Horace White and Charles Edward Bretherton, as trustees, a first mortgage on its property, consisting of about three hundred and six miles of road running through various counties in the Wallamet and Umpqua valleys, together with the rolling stock, land grants, telegraph lines, and everything pertaining thereto, with the franchise to operate the same, and the income and profits thereof, to secure the payment of certain bonds with the interest thereon, about to be issued by the defendant, at the rate of not more than twenty thousand dollars per mile of its road, then and to be constructed, for the purpose of completing the same to the California line; that said trustees accepted said trust, but thereafter, and from time to time, changes were duly made in said trustees, so that on July 7, 1883, the plaintiff became and now is the sole trustee thereof; that the defendant issued and disposed of under said mortgage, and of even date therewith, nine thousand and twenty bonds for the sum of one thousand dollars each, amounting in all to nine million and twenty thousand dollars, payable on July 1, 1921, with interest, at the rate of six per centum per annum, payable half yearly, on January and July 1st of each year; all of which bonds are still outstanding and unpaid.

That in and by said mortgage, it was, among other things, stipulated and provided as follows:

(1) That the defendant will keep its road in good order and repair.

(2) That if any interest coupon on any of said bonds shall remain unpaid, after due presentation, for six months, and such default shall not be waived, then the defendant will pay the principal of said bonds.

(3) That in case the defendant does not keep its road in good order and repair or makes default in the payment of any interest coupon for six months, said trustees may take possession of said road and operate the same; and if it is considered necessary to take legal proceedings to "foreclose" said mortgage or to obtain possession of said "premises," they shall be entitled to a receiver, to be nominated by themselves.

The bill also states, that on May 28, 1883, the defendant having ascertained that the sum of twenty thousand dollars per mile would not be sufficient to complete its road, executed and delivered to the plaintiff, as trustee, a second mortgage upon all its property aforesaid, except so much of the land grant as pertained to the completed portions of the road, and subject only to the lien of the first mortgage

aforesaid, to secure the payment of additional bonds with the interest thereon, about to be issued by the defendant, at the rate of not more than ten thousand dollars per mile of its road, then and to be constructed, for the purpose of completing the same as aforesaid; that the plaintiff accepted said trust, and thereafter, on November 5, 1883, said second mortgage was duly recorded in the office of the county clerk of Multnomah county, and also in the several offices of the county clerks of the other counties in which said property is situate; that the defendant issued and disposed of under said mortgage two thousand six hundred and ten of said bonds, dated April 1, 1883, for the sum of one thousand dollars each, amounting in all to two million six hundred and ten thousand dollars, payable on April 1, 1933, with interest at seven per centum per annum, payable half yearly, on April and October 1st, of each year; all of which bonds are still outstanding and unpaid.

That in and by said second mortgage it was stipulated and provided as in said first mortgage, as above stated.

The bill then alleged that the defendant "has failed to keep said road, rolling stock, equipment and premises in good order and repair, as required by said mortgage," and has failed to pay the interest falling due on the bonds secured by the first mortgage on January 1, 1885, amounting to two hundred and seventy-five thousand dollars, and on the bonds secured by the second mortgage, on April 1, 1884, and all the interest accruing on either of said bonds since said respective dates; that the defendant is insolvent and wholly unable to pay its debts, and its property is "a very inadequate security" for the payment of the first mortgage bonds; and that the premises cannot be sold in parcels without great injury to the interests of the beneficiaries in said trusts.

The defendant demurs to the bill, and for cause of demurrer shows:

(1) That this suit is prematurely brought, because default in the payment of the coupons on the first mortgage bonds had not been made for six months prior to the filing of the bill herein;

(2) The second mortgage is void, because made in violation of the provisions of section 3, of the act of October 20, 1882, commonly called the "Mortgage Tax Law," which provides—"All mortgages, deeds of trust, contracts or other obligations hereafter executed, whereby land situated in more than one county in this state is made security for the payment of a debt, shall be void."

In answer to the demurrer to the second cause of suit, counsel for the plaintiff maintains that the act of 1882, or this provision of it, is void, because in conflict with section 20, of article iv., of the constitution of the state, which declares: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title."

The act in question is found at page 64, of the session laws for 1882. The subject of the act is the taxation of money loaned on real property, and as a means to this end it provides that it shall be assessed as land, in the county where the land is situate; and because

it would be, or was, deemed to be inconvenient to administer the act in cases where money is loaned on land in two or more counties, it provides that thereafter a mortgage on land in more than one county shall be void; and this purpose is expressly mentioned in the title.

This act has been before the supreme court of the state on two occasions: Mumford v. Sewell, 11 Or., 67, and Crawford v. Linn county, Id., 482, and in its principal purpose and feature held valid. True, this particular clause has not been considered by the court, but if the legislature has the power to tax money loaned on land, in the county where the land lies, and as land, about which there is neither doubt nor question, it certainly has the power to provide, as a means to that end, that a mortgage shall not include land in more than one county, and if it does, it shall be void.

Abstractly considered, the legislature has plenary power over the subject, and may prohibit mortgages on land altogether, and even prohibit and make void all contracts for the payment of money at a future day. But an act for such, or any other purpose, must not embrace more than one subject, nor include matters having no necessary connection therewith: Cooley Con. Lim., 142.

What are "matters properly connected" with the "subject" of an act, is a question sometimes difficult to determine. But certainly a provision declaring two county mortgages void is sufficiently relevant and germane to an act, providing for the taxation of money, secured by a mortgage on land, particularly when, as a means to that end, such act limits all mortgages on real property to land in one county.

This sanction is a necessary, or at least a convenient means of securing obedience, to the declaration, that mortgages shall only include land in one county. And the former is as much a proper matter to be connected with the latter, as the provision common in registry acts, that an elder deed not recorded within the time thereby limited shall be postponed to a junior one, so recorded.

The provision is valid; and tried by it, this mortgage is surely void.

On the argument, it was suggested, that this class of mortgages is not within the mischief which the law was intended to remedy, and that the legislature could not have consciously intended and actually contemplated including them in its enactment. As a matter of fact this may be so, for it is not likely that the members of the legislature in the passage of this act were moved by any desire to shift the burden of taxation, in the case of a railway mortgage, from the shoulders of the debtor to those of the creditor, as they certainly were in the case of mortgages generally. But I know of no principle of law or rule of construction that authorizes a court to limit or set aside the plain language of an act upon any such surmise or conjecture, however probable. The act declares that "all mortgages, deeds of trust, contracts or other obligations hereafter executed, whereby land situate in more than one county in this state, is made security for the payment of a debt, *shall be void.*"

The language of the provision is plain and unambiguous. It speaks for itself, and there is no room for construction. The legislature must be intended to mean what it has plainly said. In such a case the court is not at liberty to look elsewhere than the act for a possible, or even probable, legislative intention: Cooley Con. Lim., 55.

At the following session of 1885 this act was amended, Ses. Laws, 9, so as to take railway mortgages, thereafter executed, out of the operation of this clause, which is equivalent to a legislative declaration that it theretofore included them.

The mortgage is void, and no right can be asserted under it. The holders of the bonds mentioned therein are simply unsecured creditors of the defendant, without any lien on its property, and must rely on their bonds and the remedy which the law gives them thereon, to enforce the collection of their demands.

The objection made by the demurrer to the suit on the first mortgage bond, is in abatement thereof. The demurrer assumes that the suit is brought to enforce the lien of the mortgage or foreclose it, as it is inaccurately termed, for the whole debt secured thereby. And as this cannot be done on account of a default in the payment of interest, until the lapse of six months thereafter, the demurrer upon this theory of the case is well taken.

But the plaintiff, in his bill, does not claim that any portion of the debt secured by the mortgage is due, except the installment of interest payable on January 1, 1885, amounting, in all, to two hundred and seventy thousand dollars. But it also appears from the bill that the property is an inadequate security for the payment of the first mortgage bonds, and that the mortgaged property cannot be sold in parcels, without great injury to the interests of the beneficiaries of the trust.

Where the interest on a debt secured by a mortgage is payable in yearly or half-yearly instalments and the principal at a future period, in case of the non-payment of any such instalment of interest, a suit may be maintained thereon, to so far enforce the lien of the mortgage; and if the sum due is not paid within a time limited by the decree of the court, sufficient of the property may be sold to pay the same. But if the property cannot be sold in parcels, without injury to the parties or one of them, the court may order the whole of it sold, free from the lien of the mortgage, and apply the proceeds on the whole debt, according to its then value: Brinkerhoff v. Thalhimer, 2 Johns. Ch., 486; Meyer v. Greber, 19 Kans., 165; Morgenstern v. Klees, 30 Ill., 422; Chicago, etc., v. Fosdick, 106 U. S., 67; Credit Co. v. Arkansas, etc. Co., 15 Fed. Rep., 52; Jones on Mort., sections 1,181, 1,459, 1,478.

This rule of law is recognized by the Oregon code of civil procedure concerning the enforcement or foreclosure of the lien of a mortgage. Section 417 provides—"when a suit is commenced to foreclose a lien, by which a debt is secured, which debt is payable in instalments either of interest or principal, and any of such instalments is

not then due, the court shall decree a foreclosure of the lien, and may also decree a sale of the property for the satisfaction of the whole of such debt, or so much thereof as may be necessary to satisfy the instalment then due, with costs of suit; and in the latter case the decree of foreclosure as to the remainder of the property may be enforced by an order of sale, in whole or in part, whenever default shall be made in the payment of the instalments not then due."

And a court of equity, without any such statutory provision, will retain jurisdiction of the case and work out the same result. In fact, this and similar statutory provisions in other states is merely an affirmance or crystalization of a prior equity practice or procedure.

This mortgage was made to secure the payment of the interest coupons, as well as the bonds to which they are attached. Each of such coupons is an instalment of the debt secured by the mortgage, and judgment might be obtained thereon for the amount in an action at law; and the right to maintain a suit in equity to enforce the lien of the mortgage, as to such coupon, as soon as it becomes due, is equally clear.

Of course, in this suit, the allegation in the bill that the defendant has failed to keep the property in "good order and repair," is altogether immaterial. The remedy for such default is not a sale of the property, but to take or obtain possession of it and put it in repair. Besides, if the matter was material, such a general and indefinite allegation of failure to keep the covenant concerning repairs, would avail nothing.

The demurrer to the first cause of suit stated in the bill and to so much thereof as relates to it, is overruled, and to the second one it is sustained.

CIRCUIT COURT, DISTRICT OF COLORADO.

UNITED STATES *v.* IRON SILVER MINING COMPANY.

July 28, 1885.

MINING PATENT—SETTING ASIDE FOR FRAUD.—Courts should be slow in disturbing the title conveyed by a United States patent to mining claims, for alleged fraud, when the facts as to the character of the ground, the kind of work and the amount done, are fully known to the officers of the government; and before they do it, should be clearly satisfied that the applicant has intentionally concealed material facts, or made false and fraudulent representations.

PLACER CLAIM—WORK IN PROSPECTING FOR VEIN.—Work done by an applicant for a placer patent, in prospecting for a vein, may be counted as work done for the purpose of securing the placer claim.

ACTION to set aside a patent. The opinion states the facts.

A. W. Brazee, United States attorney, for the United States.

G. G. Symes, for the defendant.

BREWER, CIRCUIT JUDGE. This is a proceeding in equity to set aside patents for two placer mines, known respectively as the Stimson and the Fanchon placer mines. On demurrer the bill was sustained: see 5 McCary, page 266, also supporting the opinion therein expressed, United States v. Miner, decided in the supreme court March 30, 1885; answer was thereupon filed, and the case is now submitted on pleadings and proof. The charge in the bill is fraud in obtaining these patents. It is charged that the ground embraced within these patents was not placer mining ground; that several valuable leads or lodes containing mineral in rock or place existed thereon; that both of these facts were known to the applicant and patentee; that the ground was covered with valuable timber; that he falsely and fraudulently represented to the land officers that there were no veins, leads or lodes, and that it was placer mining ground and that he had done the requisite work.

The testimony discloses that in 1879, Sawyer, the patentee, prospected on this ground and located, having claimed to have discovered some four mineral veins. After he had filed and recorded his location certificate he become embarrassed financially and called on Mr. Stephens, now one of the principal owners of the Iron Silver Mine, for assistance. There was a fine growth of timber on the premises. Mr. Stephens went over with him and examined. Upon his suggestion Sawyer determined to disregard the locations already made and to file an application for a patent upon an enlarged territory as placer mining ground, Mr. Stephens, promising to advance him money upon an agreement that when the patents were obtained the property should be conveyed to him less certain specified portions. In pursuance of this determination, applications were made in which it was set forth that there were no known leads or lodes, proofs were duly made, and in due course of time patents were issued, and thereafter conveyance of the ground to the Iron Silver Mining Company, in accordance with the prior arrangement.

I think it obvious from the testimony that the main object of Stephens was to secure the timber. As the proofs were duly and legally made, the proceedings were apparently all regular and no adverse claim presented to the ground finally patented. I take the rule to be that before a court will set aside a patent it must appear, not merely that the applicant was mistaken, but that the representations were falsely and fraudulently made, and that this fact must clearly appear. Of course the first question is, was this placer mining ground? It appears from the testimony that before Sawyer was on the premises, during some two or three years, a little placer mining had been done in Buffalo gulch, which runs up through part of this territory. There was but a limited supply of water in the gulch, flowing partially from a spring and partially fed from the melting snows. This supply was exhausted before the summer was ended, so that the amount of placer mining done was small and the proceeds slight.

It appears also from the testimony that water could be brought by

digging a ditch of some considerable length and probably at considerable expense. As a matter of fact, since the patent was issued there has been but a trifling amount of placer mining done. Of the many witnesses examined some call it placer mining grounds, others say that it is not. Witnesses differ also as to the length and expense necessary to bring water into the ground. In view of this conflicting testimony I do not think that it can be fairly said that it is satisfactorily proved that the ground was not placer mining ground or that the supply of water was so remote as to make it financially impracticable to bring enough into the ground for mining purposes.

I should have much less hesitation in finding for the defendant on this, were it not for the evident fact hereinbefore referred to that the main interest that Stevens, who furnished the money, had in the matter, was in securing the title to this timber. Still, though the parties evidently considered the timber of the most immediate value, it does not follow that they did not in good faith regard this as placer mining ground, and believe the water could be obtained at a reasonable expense.

Again, it is argued by the learned counsel for the government that the fact that Mr. Sawyer had sunk these prospect holes, and filed and recorded location certificates, estopped him from saying there were no known veins, leads or lodes in the premises. I am not willing to accept this proposition as law, and I am satisfied from the testimony that in these prospect holes he had not discovered any well-defined leads or lodes, but was simply experimenting, hoping by further work from the indications to reach such veins. The testimony of the deputy surveyor who surveyed the premises and examined these holes is very clear and positive.

One other question remains: the applicant represented that over five hundred dollars worth of work had been done and the deputy surveyor certified to this fact, and I see no reason, from the testimony, to doubt that this was correct. But I think that included in this work was that done in sinking these prospect holes, when the applicant was evidently trying to find veins, leads and lodes, and it was earnestly contended that no work done in that direction and with that purpose ought to be counted in the application for the ground as placer mining ground, as counsel for the government will say. Suppose the applicant had built on each tract a dwelling-house at a cost of over five hundred dollars, having done no work of any kind looking to the discovery of mineral; would that come within the spirit of the law? Does it not rather contemplate work done for the purpose of discovering mineral, and if so, may work done in the hope of discovering a vein be counted as work done for the purpose of securing a placer mine? With some hesitation, I think it may fairly be held that work done for the purpose of discovering mineral, whatever the particular form or character of the deposit which is the object of search, is within the spirit of the statute; and as evidently more than five hundred dollars worth of such work was done, it cannot be said that the representations made in this respect was false and fraudulent.

In conclusion, while perhaps at times frauds are perpetrated on the government, and the title to lands improperly taken, yet when, as in this case, the facts as to the character of the ground, the kind of work as well as the amount done, are fully known to the officers of the government, I think that the courts should be slow in disturbing the title conveyed; and before they do it should be clearly satisfied that the applicant has intentionally concealed material facts, or made false and fraudulent representations. Questions of doubt should be resolved in favor of the applicant. Entertaining these views, I am constrained upon the testimony to order a decree dismissing the bill.

SUPREME COURT OF UTAH.

McBRIDE v. COLLINS ET AL.

Filed July 25, 1885.

CONTRACT—ASSIGNMENT OF INDEBTEDNESS—ORDER.—Appellants held a contract for grading on a railroad. They sublet a part thereof to one Chaffin, and he sublet a part of his sub contract to the respondent, McBride. Upon the completion of his work, McBride applied to Chaffin for his pay. As the contract price for his work was the same as the price Chaffin was to get from appellants, Chaffin agreed to sign over to McBride the amount he was to be paid for that work. The appellants were notified of this arrangement, and assented to it. In pursuance thereof, the following order was executed:

"CHAFFIN'S CAMP, O. S. L. R. R., IDAHO.

"C. W. COLLINS & Co.: Please pay R. H. McBride for grading from station 4,166 to station 4,205, on the 293d mile of the Oregon Short Line Railroad, less three hundred and thirty-seven dollars and thirty-four cents, and book account, and oblige

"H. A. CHAFFIN."

Held, That such order was an assignment of the indebtedness due Chaffin; that it was not indefinite, for failing to state the specific sum to be paid.

APPEAL from the district court. The opinion states the facts.

Kimball & Heywood, and *Williams & Young*, for the appellants.

S. H. Lewis, for the respondent.

BOREMAN, J. The appellants held a contract for grading on the Oregon short line. They sublet a part thereof to H. A. Chaffin, and Chaffin sublet a part of his subcontract, to Roy H. McBride, the respondent, the subletting to McBride being for grading from station 4,166 to station 4,205 on the two hundred and ninety-third mile of the road. When McBride was through with his work, he applied to Chaffin for his pay. As the contract price for his work was the same as the price Chaffin was to get from appellants, Chaffin agreed to sign over to respondent the amount he, Chaffin, was to be paid for that work. At the time this matter was under consideration, Collins, one of the appellants, came up, was notified of the arrangement, assented to it, and directed that an order be drawn and it would be paid. Chaffin drew the order accordingly upon appellants and in favor of respondent. Collins said it was all right and would be paid. The order was as follows:

"CHAFFIN'S CAMP, O. S. L. R. R., IDAHO, September 1, 1882.

"C. W. COLLINS & Co.: Please pay R. H. McBride for grading from station 4,166 to station 4,205 on the two hundred and ninety-third mile of the Oregon Short Line Railroad, less three hundred and thirty-seven dollars and thirty-four cents, and book account, and oblige, H. A. CHAFFIN."

It was agreed that by "C. W. Collins & Co." in the order, the firm name of "Collins & Stevens" was intended.

The order was duly presented to appellants with whom it was left, and they made two payments thereon, one of one hundred dollars and one of four hundred dollars. Afterwards Chaffin gave respondent another order, as follows:

"SALT LAKE CITY, Oct. 11, 1882.

"COLLINS & STEVENS: Please keep the order that H. A. Chaffin give to R. H. McBride and pay to him the sum of eleven hundred and twenty-six dollars and forty-eight cents. He, McBride, agrees to be responsible for all mistakes and make the same good.

"H. A. CHAFFIN.

"C. CRISMON, JR., Agent."

Upon the trial a judgment was entered against the appellants for two thousand and seventy-five dollars and eleven cents and costs. Appellants then moved for a new trial which was overruled, and thereupon they appealed to this court from both the judgment and the order overruling the motion for a new trial.

Two principal point in this case is whether the order of September 1st, 1882, was an assignment of indebtedness.

The objections are urged against the order, namely; first, that it is too indefinite in its terms, there having no specific amount mentioned therein; second, that it was not drawn upon any particular fund.

(I.) The order was to pay for a particular work—the amount due for such work was a question of measurement and calculation—but whether it was a small amount or a large amount, it was to pay what the appellants had agreed to pay Chaffin for that work. The specification of the amount was therefore immaterial. They were bound to pay Chaffin at certain rate—they were by the order directed to pay at same rate to respondent. It was not indefinite to appellants. They knew what they had agreed to pay Chaffin. They were by the order simply directed to change the direction of payment. Appellants could in no way have been harmed by the failure to specify the exact sum in the order.

(II.) The second objection is fully met by the terms of the order. It is not drawn technically upon a particular fund, but it is drawn for a particular, clearly specified indebtedness. It is not a general order. It is not to pay out of any general indebtedness, but it is to pay a particular indebtedness over to another party. The law does not require anything more. Nor are we justified by the authorities in coming to any other conclusion.

Above all it was *intended* by Chaffin and by McBride as an assign-

ment, and the appellants were notified of this, and assented thereto, so far as they were concerned. The second order was no revocation of the first, nor was it intended so to be by the parties, nor understood so to be by the appellants, so far as we are able to discover from the testimony.

We see no reason for disturbing the action of the court below. The judgment and order of the court below are affirmed.

ZANE, C. J., and POWERS, J., concurred.

PEOPLE v. FENNEL.

Filed July 25, 1885.

CRIMINAL LAW—APPEAL—JURISDICTION MUST APPEAR OF RECORD.—In criminal cases the jurisdiction of the supreme court must be determined from the record, and not from extraneous matters.

DISMISSAL OF APPEAL—PERFECTING APPEAL.—After an appeal has been dismissed for want of jurisdiction appearing on the record, the appellant will not be permitted to send to the court below and perfect his appeal, when no such request was made on the motion to dismiss the appeal.

PETITION for a rehearing. The opinion on the motion to dismiss is reported in 6 West Coast Rep., 837.

Arthur Brown and *E. B. Critchlow*, for the appellant.

W. H. Dickson, for the people.

BOREMAN, J. The appeal in this case having been dismissed at the present term, the appellant petitions for a re-hearing.

The petition refers the court to an unreported case of Campbell et al. v. Taylor et al., decided when neither of the present members of the court were on the bench; and refers also to the case of McClelland v. Dickinson, 2 Utah, 100.

In neither of these cases did the questions raised go to the jurisdiction of the court. It is well settled by long practice and repeated decisions that, in criminal cases, the court must learn from the record, and not from extraneous matters, whether it has jurisdiction or not: People v. Clark, 49 Cal., 455.

The alleged harshness of the rule was duly considered, but that is not to control where the rule is one of long standing and well known to the bar.

But the petitioner further asks that he may now be allowed to make proof of service in the lower court, and have the same certified up by the clerk and added to the transcript. No reason is offered why this request was not made at the hearing of the motion to dismiss the appeal. It is a late day, after an appeal has been dismissed out of court, for a party to come back again and ask to be allowed to send to the court below and perfect his appeal. That is something he should have thought of before the motion to dismiss the appeal was disposed of. The court cannot consent that a party may sit by and wait until the motion is decided against him and then make his

request. By such a practice, a case would be almost endless in its career. Whether the request would have been granted or not, if it had been made at the proper time, it is not necessary now to consider. It is sufficient to say that it was not made and no reason is given why it was not made.

A rehearing will not be granted in any case except for strong reasons, but in this petition nothing is urged that was not fully available upon the former hearing.

The petition for a rehearing is denied.

ZANE, C. J., concurred.

POWERS, J., expresses no opinion.

SUPREME COURT OF CALIFORNIA.

No. 9,622.

MCCAULEY *v.* CUNNINGHAM.

Department One. Filed August 3, 1885.

JUDGMENT AFFIRMED FOR FAILURE OF APPELLANT to file points and authorities.

APPEAL from a judgment and order of the superior court of San Joaquin county.

D. S. & S. L. Terry, for the appellant.

F. T. Baldwin and *J. C. Campbell*, for the respondent.

BY THE COURT. Appellant having failed to file her points and authorities on appeal within the time granted, we think the judgment and order should be affirmed.

So ordered.

No. 9,545.

CLEGHORN *v.* CLEGHORN.

Department One. Filed August 3, 1885.

JUDGMENT AFFIRMED FOR FAILURE OF THE APPELLANT to file points and authorities.

APPEAL from a judgment and order of the superior court of Tehama county.

Chipman & Garter, for the appellant.

John F. Ellison, for the respondent.

BY THE COURT. Appellant having failed to file her points and authorities on appeal, within the time granted, we think the order should be affirmed. So ordered.

No. 8,706.

WHITMORE v. HENDERSON.

Department Two. Filed August 3, 1885.

JUDGMENT AFFIRMED FOR FAILURE OF APPELLANT to file points and authorities.

APPEAL from a judgment and order of the superior court of Stanislaus county.

R. B. Treat and *W. L. Dudley*, for the appellant.

W. E. Turner and *D. S. Terry*, for the respondent.

BY THE COURT. Appellant having failed to file his points and authorities within the time granted, we think the judgment should be affirmed.

So ordered.

On August 11, the court made the following order:

Ordered that the judgment entered in this cause by this court, August 3, 1885, be amended by inserting, after the words "the judgment should be affirmed," the words, "and it appearing that the appeal was without merit, and was taken for delay, damages in the sum of two hundred and fifty dollars should be imposed in favor of respondent and against appellant."

So ordered.

No. 9,800.

HAMIL v. LITTNER.

Department One. Filed August 12, 1885.

FINDING—AGREED STATEMENT OF FACTS.—In a case submitted upon an agreed statement of facts, no findings are necessary.

JUDGMENT AFFIRMED UPON THE AUTHORITY of Hay v. Hill, 3 West Coast Rep., 352.

APPEAL from a judgment of the superior court of Sacramento county. The opinion states the facts.

Freeman & Bates, for the appellant.

A. P. Catlin, for the respondent.

BELCHER, C. C. This case was submitted to the court below upon an agreed statement of the facts, and findings were, therefore, not necessary. Besides, the court, in its decision of the case, recited the facts substantially as they were agreed to, and these facts and the conclusions of law thereon were separately stated.

The exact point involved in this case was decided in Hay v. Hill, 3 W. C. R., 352. We are satisfied that that decision was right.

Upon the authority of that case, the judgment here should be affirmed.

SEARLS, C.; and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

No. 9,639.

LUHRS, ASSIGNEE, ETC. v. KELLY.

Department One. Filed August 12, 1885.

INVOLUNTARY INSOLVENCY—JURISDICTION WHEN ACQUIRED—NOT SUBJECT TO COLLATERAL ATTACK.—Where a petition in involuntary insolvency proceedings is properly signed, verified and filed, and a copy thereof, together with a copy of the order to show cause, is regularly served on the debtor, in the manner provided by law for the service of summons in civil actions, the court obtains jurisdiction of the case and for errors afterwards committed, such as the filing by the assignee of a bond, in an amount less than that ordered by the court, its proceedings cannot be collaterally attacked.

THE SAME—ASSIGNMENT EVIDENCE OF ASSIGNEE'S RIGHT TO SUE.—Under section 18 of the insolvency act of 1880, a certified copy of the assignment is conclusive evidence of the assignee's authority to sue.

IMPEACHING WITNESS—EVIDENCE OF HOSTILITY.—When a witness has testified to matters material to the issues, the party against whom he has testified, may, on cross-examination, show that the witness is hostile to or prejudiced against him; and to that end may lay the foundation for showing that the witness has attempted to buy or bribe other witnesses. But this can only be done when the witness has testified to material matters.

INSTRUCTIONS HELD TO BE WITHOUT ERROR.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Grove L. Johnson, for the appellant.

Freeman & Bates, for the respondent.

BELCHER, C. C. This is an action commenced by the plaintiff, as assignee of one S. J. Dierssen, an insolvent debtor, to recover the value of four barrels of whisky and certain other personal property alleged to have been transferred by the insolvent to the defendant in violation of the provisions of section 55 of the insolvent act of 1880. The insolvency proceedings were involuntary, and every step taken in them was alleged in the complaint and denied in the answer.

When the case came on for trial, the plaintiff offered in evidence the petition in insolvency, the bond accompanying the petition, the order to show cause with the return of service thereof on the respondent, the order adjudging the respondent to be an insolvent debtor, and requiring him to file a schedule and inventory of his property, with the return of service thereof, the order appointing the plaintiff assignee, the bond of the assignee, and a certified copy of the assignment made by the clerk of the court to the plaintiff as assignee. The defendant objected to the evidence upon the ground that it was irrelevant and immaterial, and that the proceeding did not conform to the requirements of the insolvent law. The court overruled the objections and admitted the evidence. We see no error in the rulings.

The petition was properly signed, verified and filed. A copy of the petition and a copy of the order to show cause were regularly served on the debtor in the manner provided by law for the service of summons in civil actions. This gave the court jurisdiction of the case: Ohleyer v. Bunce, 2 W. C. R., 142; and for errors afterward committed, its proceedings could not be assailed collaterally. The

order to show cause required the debtor to appear on the twenty-eighth day of December. He did not appear, and the order adjudging him an insolvent was entered on the third day of January. There was nothing in this delay of which the defendant could take advantage.

As appears by the record, the order, appointing the plaintiff assignee, required him to give a bond in the sum of two thousand dollars. On the next day he gave a bond in the sum of five hundred dollars, and it was approved by the judge and filed. In the assignment made by the clerk, it is recited that the assignee had "filed a bond in the sum of five hundred dollars as ordered by the court." There was here evidently some mistake, but it was one which did not concern the defendant. The creditors and debtor were alone interested in the amount and sufficiency of the bond, and they acquiesced in the bond given. The court had jurisdiction, and its approval of the bond was sufficient to justify and make valid the assignment as against a mere collateral attack.

A further and conclusive answer to all these objections is found in the fact, that section 18 of the act provides that, "in suits prosecuted by the assignee, a certified copy of the assignment made to him shall be conclusive evidence of his authority to sue."

Under this provision it was unnecessary for the plaintiff to allege or prove the various steps taken in the insolvency proceedings. He might have alleged his ownership of the property and proved the fact, so far as it could be proved by the record, by producing a certified copy of the assignment made to him. The law does not intend that in actions commenced by the assignee to recover the property of the estate, the questions arising in the progress of the insolvency proceedings shall be open to review and retrial. Still there was no error prejudicial to the defendant in admitting proof of all these proceedings: Dambman v. White, 48 Cal., 439; Rogers v. Stevenson, 16 Minn., 68; Cone v. Purcell, 56 N. Y., 649; Shawhan v. Wherrett, 7 How., 627.

In the progress of the trial plaintiff was called as a witness in his own behalf, and testified that he "was acquainted with the value of groceries; that whisky on the twenty-fifth day of November, 1882, and now, was worth at least one dollar and twenty-five cents per gallon; that Miller whisky was worth two dollars and twenty-five cents per gallon; that a barrel contained from forty to forty-five gallons; that he had known S. J. Dierssen for a good many years; that Dierssen was a retail grocer on and prior to November 25, 1882, and carried a stock in trade amounting to from one thousand two hundred dollars to one thousand five hundred dollars in value."

On his cross-examination the witness testified that he had a conversation with one George Dierssen, a brother of S. J. Dierssen, at a certain time and place, and was then asked: "In the course of that conversation did you tell him that you would let up on Louis Dierssen if he would testify against Kelly in this case; that you would let up on him and not prosecute him?" The question was

objected to by counsel for plaintiff upon the ground that it was irrelevant, and the objection was sustained. The defendant then made an "offer to show that this witness openly attempted to bribe witnesses by promises of immunity." The offer was also objected to as irrelevant and excluded, and to these rulings the defendant excepted.

Undoubtedly when a witness has testified to matters material to the issues, the party against whom he has testified may, in the cross-examination, show that the witness is hostile to or prejudiced against him: People v. Wasson, 3 W. C. R., 642; Greenleaf on Ev., sec. 450; and to that end may lay the foundation for showing that the witness has attempted to buy or bribe other witnesses. But this can only be done when the witness has testified to material matters. Were the matters testified to by the witness in this case material? The testimony above quoted is all the testimony in the case which is found in the record. There was no issue as to the fact that Dierssen was a retail grocer and carried a stock in trade amounting to from one thousand two hundred dollars to one thousand five hundred dollars in value.

In the complaint it is alleged that Dierssen transferred to the defendant four barrels of whisky of the value of five hundred dollars, and in the answer it is admitted that he transferred four barrels of whisky of the value of three hundred dollars. Nothing appears in the pleadings or elsewhere as to the kind or quality of the whisky. It would seem, therefore, that when the witness testified that whisky was worth one dollar and twenty-five cents per gallon, and a barrel contained from forty to forty-five gallons, he was testifying to more than was admitted by the defendant. Besides, the value of all the property transferred, as found by the verdict of the jury, was only four hundred dollars, and no complaint is made that the damages are excessive. On the whole, we are unable to see that the court committed any material error in the rulings complained of.

The court instructed the jury very fully upon every question in the case. These instructions stated the law of the case fairly and clearly, and we fail to see that they were either contradictory or misleading. Several instructions asked by the defendant were refused, but we think, in so far as they were sound as propositions of law, they were embraced in others instructions given. It would subserve no useful purpose to speak of each of them separately.

The judgment and order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

No. 9,943.

MELONE v. DAVIS.

Department One. Filed August 12, 1885.

ESTATES OF DECEASED PERSONS—ACTION FOR DISTRIBUTIVE SHARE—DEFENDANT—DEMAND.—An action to recover the amount or sum distributed to plaintiff by a decree of distribution in the estate of a deceased intestate, and which was, by the terms of the decree, ordered to be paid by the administrator within a certain number of days, should be brought against the defendant individually, and not as administrator. In such action the complaint need not allege a demand on the defendant as administrator, and refusal to pay. The suit itself is a sufficient demand.

APPEAL from a judgment of the superior court of San Joaquin county, entered in favor of the plaintiff. The opinion states the facts.

J. H. & J. E. Budd, for the appellant.

August Muenter, for the respondent.

SEARLS, C. Defendant was administrator of the estate of one Joseph M. Davis, deceased.

His final account, as such, was rendered, settled, and a decree of distribution made by the court.

This action is brought to recover the amount or sum distributed to plaintiff by that decree, and which was, by the terms of the decree, ordered to be paid by the administrator within ten days from September 20, 1881.

The cause was tried by the court, who filed findings in writing, and rendered judgment thereon in favor of plaintiff.

Defendant appeals from the judgment, and the case comes up on the judgment roll.

Two points are urged by appellant. First, that the findings fail to show that a demand for payment was made upon defendant before suit was brought.

Second, that no action can be maintained against defendant as an individual until demand on him as an administrator and refusal to pay.

One who receives money standing in the position of a trustee, is in general not liable in an action for money received until demand is made or some breach of trust or duty committed: Walrath v. Thompson, 6 Hill, 540.

In the present case the money was received as administrator, and when the decree of distribution was made by the court requiring defendant, within ten days, to pay plaintiff the sum of money awarded her, and to make to her the assignments provided to be made to her, it became, and was, the plain duty of defendant to comply with the terms of the decree, and having for nearly three years failed so to do, he was guilty of a breach of duty, and no demand was necessary before suit brought.

The decree of distribution had, in most respects, all the efficiency of a judgment at law, or a decree in equity.

It could have been enforced by proceedings for contempt: Wheeler v. Bolton, 54 Cal., 302.

An action could be maintained upon it for non-compliance with its requirements, and we see no greater necessity for a demand than exists in case of suit upon an ordinary judgment at law, or before issuing execution upon a judgment.

Defendant was liable in contempt for not making payment under the decree, and as to him, suit brought was a sufficient demand: Cummings v. Howard, 63 Cal., 503.

Second—The action was properly brought against defendant individually.

In actions against administrators and executors, founded upon promises made by the testator or intestate during his life, the defendant must be sued in his representative character; he may plead *plene administravit*, and the judgment will not be against him personally, but *de bonis testatoris*.

Not so, however, when an administrator or executor is sued upon his own promise or obligation, made or incurred after the death of the testator or intestate. It is not necessary to name the defendant as executor or administrator, though it has been held it may be done by way of description, but he may be proceeded against individually, and a judgment *de bonis propriis* had: Waldsmith v. Waldsmith, 2 Ohio, 156. No action can be maintained against an administrator, *as such*, that is founded upon malfeasance or misfeasance, or for a tort: Eustace v. Johns, 38 Cal., 3.

A claim against the estate must be presented to the administrator for allowance before suit brought.

This was not a claim *against* the estate, but a demand for a part of the estate.

Defendant had been the administrator; as such he had taken all the steps necessary to a distribution of the fund in hand. The court had made its decree requiring him to distribute to plaintiff the property and money sought in this suit. By refusing to comply with the decree, he became personally liable to plaintiff, as in case of *devastavit*.

The hardship of paying taxes on the property since 1881, complained of by counsel for appellant, is not entitled to consideration, in view of the fact that, had appellant performed his duty, by distributing the property as ordered by the court, the taxes thereon would not have devolved upon him to pay.

Like considerations are applicable to the complaint against the interest awarded by the court below.

We are of opinion the judgment of the court below should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

No. 9,776.

CLARY v. HAZLETT ET AL.

Department One. Filed August 12, 1885.

PATENTS TO LAND—UNAUTHORIZED RESERVATION IS VOID.—Where a United States patent to land, contains a reservation or condition not authorized by law, such reservation or condition is void.

PLACER PATENT—RESERVATION OF VEIN OR LODE IS VALID.—Under section 2,333, of the United States revised statutes, the usual reservation contained in patents to placer claims, viz.: "That should any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed or known to exist within the above described premises, at the date thereof, the same is expressly excepted and excluded from these presents"—is authorized and valid. As to such vein or lode, no title vests in the placer patentee.

APPEAL from a judgment of the superior court of Siskiyou county, entered in favor of the defendants. The opinion states the facts.

Wm. McConaughy, for the appellant.

A. B. Gillis and *H. B. Warren*, for the respondent.

SEARLS, C. Action to recover damages for trespass upon mining claims, and for injunction against defendants to restrain them from similar trespasses.

Plaintiff bases his action upon a patent issued to him for the *locus in quo*, as a placer mining claim, under the provisions of chapter vi. of title 22 of the revised statutes of the United States.

Plaintiff's claim is known as the Ellis placer mining claim, and within the exterior limits thereof, there is a regularly defined lode of gold-bearing quartz rock in place, which was known to exist at the time of plaintiff's application for patent; and his application did not include an application for the lode.

The patent to plaintiff contained the usual reservation in such cases, viz.: "That should any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed or known to exist within the above-described premises at the date hereof, the same is expressly excepted and excluded from these presents."

The land upon which the alleged trespasses were committed, consisted of this quartz lode, which was located by the grantor of defendants in 1879 under the name of the California Queen mine, and work by said defendants upon the quartz lode as situate and located constitutes the supposed trespasses complained of.

Defendants had judgment and plaintiff prosecutes this appeal.

The question in the case upon which the decision must turn is, whether by his patent to the Ellis placer mining claim the plaintiff acquired title to said quartz lode or vein?

Section 2,333 of the revised statutes of the United States provides as follows: "Where a vein or lode, such as is described in section 2,320, is known to exist within the boundaries of a placer claim, an application for a patent of such placer claim, which does not include an application for the vein or lode claim, shall be con-

strued as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

The preceding portion of the same section provides that the applicant for a patent, being in possession of a placer claim and also of a vein or lode claim, included within the boundaries thereof, may, upon application therefor, and upon paying five dollars per acre for the lode claim therein, obtain patent for the whole.

Appellant contends that the condition in the patent "that should any vein or lode of quartz or other rock in place, bearing gold * * * be claimed or known to exist within the above described premises at the date hereof, the same is expressly excepted and excluded from these presents"—is void.

It must be conceded that where a patent contains a reservation or condition not authorized by law, such reservation or condition is a nullity: Stark v. Starr, 6 Wallace, U. S., 402; Wolfley v. Lebanon Mining Co., 4 Col., 115.

The land department is but an instrument by which the objects of the law are attained, its jurisdiction and mode of procedure are defined by law, and its results must be such as are warranted by the paramount authority under which it acts.

Assuming this hypothesis as correct, it becomes necessary to inquire whether the clause quoted from section 2,333 authorizes the reservation in the patent to plaintiff. Upon this question we do not entertain a serious doubt.

The language of section 2,333, in cases of known lode claims in placer mines, applied to be patented, and which lode claims are not sought to be patented, is explicit, and such omission "shall be construed as a conclusive declaration, that the claimant of the placer claim has no right of possession of the vein or lode claim."

If he has no right of possession, it must follow that he has no right to a patent.

Congress has provided the manner in which a right to the possession of mining claims may be acquired, and has further provided for the issuance of patents to those who have acquired such right of possession—has provided that in case of adverse claims, he who substantiates his right to possession shall thereupon be entitled to a patent.

And when the language in question is considered in connection with the context, and with the other provisions of the mining law, the conclusion is reached that by the waiver of his right to possession, a waiver of his right to a patent is implied. The latter is a sequence of the former and cannot exist without it.

By this construction the harmony of the whole section is maintained while the interpretation claimed by counsel for appellant would permit an applicant for patent to acquire title to a quartz claim at two dollars and fifty cents per acre, instead of five dollars,

as provided by law, and would render the latter clause of the same section under which unknown quartz lodes pass to the patentees of placer mines, unnecessary.

We conclude the exception and exclusion of the quartz lode in question as specified in the patent was authorized by law and that no title thereto vested in the appellant under his patent.

There is substantially a finding by the court below upon all the issues made by the pleadings in the case.

It is not necessary that the facts as found should follow the language of the pleadings which they support. If the truth or falsity of each material allegation not admitted can be demonstrated from the findings, the requirements of the code are met.

The judgment should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

No. 9,909.

BELL v. McCLELLAN.

Department One. Filed August 12, 1885.

SALE—ACTUAL AND CONTINUED CHANGE OF POSSESSION.—In an action by an alleged vendee to recover the possession or value of two hay presses, taken under an attachment in an action against the vendor, the evidence reviewed, and, *held*, that the sale under which the plaintiff claimed, was void as against creditors of the vendor, because it was not accompanied by an actual and continued change of possession.

APPEAL from a judgment of the superior court of Butte county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

A. F. Jones, T. L. Ford and *Reardon & Freer*, for the appellant.

Gray & Sexton, for the respondent.

BELCHER, C. C. This is an action to recover the possession or value of two hay presses.

It appears that the presses were the property of one Duncan and were stored on the farm of McNulty, his brother-in-law. On the nineteenth day of January, 1884, Duncan sold the presses to the plaintiff in satisfaction of an indebtedness then due from him to the plaintiff.

The plaintiff received a bill of sale of the presses, and immediately wrote to McNulty, stating that he had bought them from Duncan, and asking McNulty to hold them for him. Duncan gave McNulty no notice of the sale. The presses remained stored in McNulty's shed till the second of June, 1884, when the plaintiff again wrote to McNulty telling him to let Duncan take them and use them. Under this permission Duncan took the presses, had them repaired at a blacksmith's shop, and used them to bale hay on his own account until the twenty-ninth of August following. He hired the men,

paid them, contracted with parties for baling and received pay therefor. McNulty was one of the men employed by him and had charge of one of the presses. On the twenty-ninth of August, Duncan and McNulty went to the plaintiff's store at Oroville, and Duncan then told the plaintiff that he was sick and didn't want the presses any longer, and the plaintiff told McNulty to take them and continue to bale hay with them for him. McNulty took the presses and continued baling hay with them for the plaintiff till the fourth of September. On that day they were taken from him by the defendant, acting as sheriff, under a writ of attachment issued out of the superior court in an action commenced by one Davidson against Duncan. Plaintiff never saw the presses and never took or held possession of them except as above shown.

Davidson never heard of the sale of the presses until the twenty-ninth of August, when Duncan told him he had sold them to the plaintiff in January.

Upon these facts the court below found "that the sale of said presses by C. M. Duncan to plaintiff was made in good faith, accompanied by an immediate delivery and followed by an actual and continued change of possession, and that plaintiff was on the commencement of this action, the legal owner of, and entitled to the possession of the same."

The appeal is by the defendant from the judgment and order denying his motion for new trial.

Conceding that the sale was made in good faith and was accompanied by an immediate delivery, notwithstanding notice of the sale was given by Duncan to McNulty, still the appellant insists that it was not followed by an actual and continued change of possession as required by section 3,440 of the civil code. In Stevens v. Irwin, 15 Cal., 506, it is said: "The delivery must be made of the property; the vendee must take the *actual* possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous—not taken to be surrendered back again—not formal, but substantial. But it need not necessarily continue indefinitely, when it is *bona fide* and openly taken, and is kept for such a length of time as to give general advertisement to the *status* of the property and the claim to it by the vendee."

In Cahoon v. Marshall, 25 Cal., 201, it is said: "What constitutes an actual change of the possession of personal property, as distinguished from that which by mere intendment of law follows the transfer of title, is not of difficult solution. It is an open, visible change, manifested by such outward signs as render it evident that the possession of the vendor has wholly ceased:" See also Godchaux v. Mulford, 26 Cal., 316, and Hesthel v. Myles, 53 Cal., 623.

In Stevens v. Irwin, the vendee took immediate possession of the

property, and held the open, visible and notorious possession thereof for more than a year and it was held that the length of time was sufficient to give general advertisement to the world of the status of the property. Here there was no open, visible change of possession, and the constructive possession which the plaintiff took lasted only from January to June. This was a time when there was little or no occasion to use hay-presses; but when the haying season returned, and there was hay to be baled, the presses were again found in the open, visible possession of the vendor, and they so remained, and were used by him on his own account for nearly three months.

We are unable to see how this can be held to be the actual and continued change of possession which the law requires, to make the sale valid as against creditors.

It is suggested by counsel for respondent that the question whether the possession is actual and continued as against a creditor is one which must ordinarily be determined by the jury, and that when the testimony is conflicting upon the subject, the judgment should not be reversed. The answer is that the testimony here is not at all conflicting, and that upon the facts as stated, it is simply a question of law, whether they show an actual and continued change of possession or not.

We think the judgment and order should be reversed and the cause remanded for a new trial.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

No. 9.615.

SACRAMENTO LUMBER CO. v. WAGNER ET AL.

Department One. Filed August 12, 1885.

MARRIED WOMAN'S CONTRACT—AGREEMENT TO PAY DEBT OF ANOTHER—STATUTE OF FRAUDS.—The appellant, a married woman, as part consideration of a tract of land, promised to pay certain debts of her husband. *Held*, that, under section 158 of the civil code, she was capable of entering into such contract; that the same did not require to be in writing, under the statute of frauds, and that her husband's creditors, in whose favor such promise was made, could maintain an action thereon, although they were not parties to the agreement.

APPEAL from an order of the superior court of Sacramento county, denying the defendant, Helena Wagner, a new trial. The opinion states the facts.

J. H. McKune, for the appellant.

Freeman & Bates, for the respondent.

BELCHER, C. C. The defendants, being husband and wife, bought the real property, mentioned in the complaint, in February, 1881. At the time of the purchase, the defendant, Helena, paid one third of the purchase price with money which was her separate property, and for the other two-thirds they gave their joint promissory note. Shortly after the purchase they commenced to erect a building on the premises, and obtained lumber and material therefor from the plaintiff. The lumber and materials furnished were charged to John Wagner, the husband. On the fourth day of April, 1881, the defendants reconveyed the property to Michael Wagner, their grantor, who held it until the eleventh day of July following, and then, for the expressed consideration of one dollar, conveyed it back to defendant, Helena. Between April 4, and July 11, the construction of the building was continued, and materials therefor were furnished by the plaintiff and by Hartwell, Hotchkiss & Stalker, and charged to John Wagner. At the time of the conveyance to her, on the eleventh of July, defendant, Helena, agreed to pay the bills against the property, including the bills due the plaintiff and Hartwell, Hotchkiss & Stalker, and this, she told the scrivener who drew the deed, was a part of the consideration of the deed to her. On the same day she went with her husband to the plaintiff's managing agent and told him that she owned the property and was going to pay all the bills, and wanted to know how much discount the plaintiff would allow her, if she paid the cash. She also went with her husband to the place of business of Hartwell, Hotchkiss & Stalker, and asked for their bill, and said she was going to pay it. The bills not being paid, Hartwell, Hotchkiss & Stalker assigned their bill to the plaintiff, and this action was brought to recover the amount of the two bills. The defendant, John, appeared, and consented that judg-

ment be taken against him as prayed for in the complaint. The defendant, Helena, answered with a general denial and a plea of coverture. The case comes here on an appeal by the defendant, Helena, from the order denying her motion for a new trial.

The fact that the appellant was a married woman cannot avail her in this case. She was not disqualified by reason of coverture from entering into a contract of the character indicated in the record. In this state "either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried:" Civil code, sec. 158.

The appellant accepted a conveyance of the property and as a part consideration for that conveyance promised to pay the bills sued on. Even if the obligation to pay them rested on John Wagner, or Michael Wagner alone, still the appellant's promise to pay them was not void because not in writing, signed by her. Section 2,794 of the civil code provides: "A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing. * * *

"3. Where the promise, being for an antecedent obligation of another, is made * * * upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation or from another person." It is claimed that the debt was the obligation of John Wagner, and that a promise made to John Wagner or Michael Wagner could not operate as a promise to the plaintiff or to Hartwell, Hotchkiss & Stalker, on which they could sue, for the reason that there was no privity between the parties.

The same point was made and maintained in McLaren v. Hutchinson, 18 Cal., 80. The court said: "In this case the defendant purchased of one Beach, a tract of land, and, as a part of the consideration, agreed to pay certain debts specified in the complaint. Neither the plaintiff nor any of the persons to whom the debts were owing were parties to the agreement, and it does not appear that they even assented to or attempted in any manner to connect themselves with the transaction prior to the commencement of the suit. The plaintiff is the present holder of these debts, and the question is whether he can maintain an action against the defendant for their recovery. It is clear, we think, that he cannot. There is no privity between the parties, and the legal position of the plaintiff is that of a stranger to the agreement."

The same point was again made in Lewis v. Covilland, 21 Cal., 189, and, speaking of McLaren v. Hutchinson, the court said: "In that case the suit was upon an agreement made by the defendant and with a third person to pay a debt owing by the latter to the plaintiff, and we held that as the plaintiff was not a party to the agreement, the action could not be maintained. The decision was placed upon the ground that there was no privity; but since the case was decided the matter has frequently been called to our attention, and we are by no means satisfied with the rule laid down. The agreement was

founded upon a sufficient consideration, and the modern doctrine in such cases seems to be in favor of the maintenance of the action."

We are satisfied that an action like that described in McLaren v. Hutchinson may be maintained, and that the court did not err in this case in rendering judgment in favor of the plaintiff: Barker v. Bucklin, 2 Denio, 45; Delaware and Hudson Canal Co. v. Westchester Co. Bank, 4 Denio, 97; Lawrence v. Fox, 20 N. Y., 266; Turk v. Ridge, 41 N. Y., 206; Barker v. Bradley, 42 N. Y., 316; Arnold v. Lyman, 17 Mass., 400.

The order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

WEST COAST REPORTER.

WHOLE NO. 87. AUGUST 27, 1885. VOL. VII. NO. 7.

CIRCUIT COURT, DISTRICT OF COLORADO.

PITTENGER *v.* PROVIDENCE WASHINGTON INSURANCE COMPANY.

August 3, 1885.

ACTION ON INSURANCE POLICY—BREACH OF CONDITIONS MUST BE SPECIALLY PLEADED.—In an action on an insurance policy, the defendant, if he relies upon a breach of some particular condition of the policy, must specially plead it. Evidence thereof is inadmissible under a general denial that the plaintiff had performed all the conditions on his part.

ACTION on a policy of insurance. The opinion states the facts.

Sam. P. Rose, for the plaintiff.

Patterson & Thomas, for the defendant.

HALLETT, J. (Orally.) Mr. Geo. W. Bittinger brought an action against the Providence Washington Insurance Company on a policy of insurance. He alleged, in general terms, that he fulfilled the conditions of the policy; I believe, set out the policy also. The defendant answered, in the like general terms, that he did not observe the conditions of the policy. "Defendant, further answering, denies that on the first day of November, 1883, or at any other time, said Atkinson gave notice of proof of loss, as provided in said policy, and denies that said Atkinson performed all and singular the conditions of said policy on his part to be performed."

At the trial, the defendant contended that upon this state of the pleadings the plaintiff was bound to prove affirmatively that he had fulfilled and executed all the terms of the policy, and if that was not true, that the defendant was at liberty to offer evidence to the point that some of the conditions had not been fulfilled, as that the property was allowed to remain vacant and unoccupied for some time, and that it was not kept in operation, the property being a mill and furnace and the like; that no watchman was kept on the premises, as required by the terms of the policy, and, perhaps, some other things of the same character. This evidence was excluded, on the ground that such defense must be pleaded specially. The question has been argued on motion for new trial, and I see no reason to reverse the ruling which was made at the trial. It is laid down in the books that it is not necessary to set forth in the complaint a condition subsequent, and that a defendant relying upon it must plead it. This is true under systems of pleading which admit of more general defenses than ours. Under the code of this state, it

is provided that the answer shall be special. No doubt is entertained that this requires a specific denial to each allegation in the complaint, and if it be said that the plaintiff has declared only generally, there is some doubt upon that, inasmuch as he has set forth the policy in his complaint; if the defendant accepted that method of declaring, he was still bound to plead his defense specially. In section 586, May on Insurance, the rule is so laid down. I think there can be no doubt as to its correctness. It would be extraordinary if a plaintiff coming into court with one of these policies of insurance should be bound to have witnesses to every thing that is set down in the policy, to prove everything which may be set up as a defense. I say that would be most remarkable, and nobody would have greater reason to complain of it than the insurance company itself, because, if plaintiff should be fortified in all points with an extraordinary number of witnesses, the cost would be very great.

The rule is, that in respect to all such matters the insurance company must plead its defense specially, in order that it may put the matter in issue.

The motion for new trial will be denied, and judgment on the verdict.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

ENDEY v. COMMERCIAL FIRE INS. CO. OF N. Y.

August 17, 1885.

REMOVAL—CITIZENSHIP.—A suit cannot be removed from a state to a national court, under the act of 1875, on the ground of citizenship, unless the requisite citizenship of the parties exists, both when the suit was commenced, and at the time of filing the petition for removal.

AMENDMENT OF PETITION IN U. S. COURTS.—Where a petition for removal does not show the requisite citizenship of the parties, whether the circuit court is authorized to allow an amendment showing jurisdiction, *quere?* But, conceding the power, where the state court has refused to order the removal of a cause on a defective petition, an amendment in the U. S. circuit court, to remedy the defect, is not a matter of right, and the court in the ninth circuit will not permit an amendment. Inconvenience of allowing amendments in such cases pointed out.

Crittenden Thornton, for motion.

Eagon & Armstrong, *contra*.

SAWYER, CIRCUIT JUDGE. A suit cannot be removed from a state court to a national court on the ground of citizenship, under the act of 1875, unless the requisite citizenship of the parties exists, both when the suit was commenced, and at the time of filing the petition for removal: Gibson v. Bruce, 108 U. S., 562; Houston & Tex. Cent. R. Co. v. Shirley, 111 U. S., 360. The record in this case does not show the proper citizenship of plaintiff, at the time of the commencement of the suit, and the state court, therefore, properly, refused to make an order removing the cause.

Plaintiff asks leave to amend his petition, in this court, in such manner, as to show the proper citizenship of the parties to give jurisdiction. In McNaughton v. S. Pa. Coast R. R. Co., 2 West Coast Rep., 664, and S. C., xix. Fed. Rep., 883, doubt was expressed as to the authority of the court to allow such an amendment, notwithstanding the ruling to the contrary in some circuits, and the inconvenience of the practice pointed out. But, conceding the authority, it was held, that such an amendment is not a matter of right, but a matter resting in the sound discretion of the court, and ought not to be permitted.

This court is still satisfied with that ruling, and will adhere to it until overruled by higher authority. As shown in the case cited, great embarrassments might result from such an amendment, as after an amendment in the U. S. circuit court, the records of both courts would show jurisdiction. The supreme court has settled the point, that the state court is not required to let go its hold upon a case, till a proper cause for removal is shown by its record. This being so, upon an amendment in the circuit court, both courts might regularly proceed to render final judgments that might be different, or even be opposed, and there be no error disclosed by the record of either court, upon which the judgment could be reversed.

The amendment of the petition is denied, and the cause remanded, with costs.

SUPREME COURT OF CALIFORNIA:

No. 9,739.

COGLAN *v.* BEARD.

Department One. Filed August 18, 1885.

FINDINGS—SUFFICIENCY OF EVIDENCE—SPECIFICATIONS OF INSUFFICIENCY MUST BE PARTICULAR.—The sufficiency of the evidence to sustain the findings, will not be considered on appeal, if the bill of exceptions fails to specify the particulars in which the evidence is alleged to be insufficient. A specification that the "court erred in finding" certain facts, does not meet the requirements of section 648, of the code of civil procedure.

ELECTION CONTEST—BALLOTS AS EVIDENCE.—In an election contest the ballots are the primary and best evidence of the number of votes received by any candidate, provided they have not, in any way, been tampered with, and the burden is upon the contestant to show that fact. Such ballots are not inadmissible, from the fact that, for a certain time, they were in the possession of the contestant as the *de facto* county clerk.

THE SAME—STATEMENT OF FIRST COUNT AS EVIDENCE ON SECOND TRIAL.—On a second trial of an election contest, a tabulated statement showing the result of the count, by the judge, on the first trial of the case, is admissible in evidence, as tending to show whether the ballots had been tampered with between the dates of the trials.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the plaintiff. The opinion states the facts.

John S. Carey and *Wm. H. Beatty*, for the appellant.

W. C. Van Fleet, and *S. S. Holl*, for the respondent.

BELCHER, C. C. This is the second appeal in this case.

Upon the first appeal, the judgment was reversed, and the cause remanded for a new trial: 1 W. C. R., 362.

On the second trial, the judgment was again rendered in favor of the plaintiff, and, from that judgment, this appeal is taken.

The findings fully support the judgment, and the only points made by the appellant are, that some of the findings are not justified by the evidence, and that the court erred in admitting certain evidence against the objection of the defendant.

1. We cannot review the evidence, for the reason that there is in the bill of exceptions no specification of the particulars in which the evidence is alleged to be insufficient to justify the findings. The specification is that "the court erred in finding" certain facts, but that does not meet the requirements of the code: C. C. P., sec. 648.

But if the specifications had been sufficient, the point would not have been well taken.

There was evidence which, if admissible, was sufficient to justify each of the findings of fact.

2. At the general election, held in Sacramento county, in November, 1882, the plaintiff and defendant were candidates for election to the office of county clerk. According to the returns of the election, as canvassed by the board of supervisors, the defendant had a plurality of sixteen votes, and he received the certificate of election. In due time the plaintiff commenced this proceeding to contest the right of the defendant to the office. The case was tried before the

superior court, early in December, and in the course of the trial all the ballots cast at the election were brought into court and counted by the judge presiding. Judgment was rendered in favor of the contestant, and from that judgment Beard appealed on the twenty-second day of December, and, within five days thereafter, perfected his appeal by filing the necessary bond.

At the time the appeal was taken and perfected, Thomas H. Berkey was clerk of the county, and the contestant, Coglan, was his deputy. Berkey's term expired on the eighth day of January, 1883, and on that day he turned the office, and everything pertaining to it, over to Coglan, who retained possession up to the time of the second trial of the case. Among other things of which he thus became custodian, were the ballots cast at the election to which the contest relates. After the ballots were counted on the first trial, they were replaced by Berkey in the vault of the Hall of Records, and the vault was securely locked. When Berkey surrendered the office to Coglan he turned over to him also the key to this vault.

On the second trial the contestant first proved that the ballots were the genuine ballots delivered to the county clerk by the officers of the election; that they remained securly locked in a vault and in the same condition as when delivered up to the time when they were brought into court to be counted on the first trial; that after they were counted they were returned by the judge, who had counted them, to their respective envelopes, and were again securely and carefully sealed up by him and a strip of paper was gummed over the opening cut in the envelope, on which he wrote his initials; that they were then returned to the vault and remained there in no way changed or tampered with until they were brought into court to be again counted on this trial. The contestant then offered in evidence the ballots from ten precincts of the county and asked that they be counted. The defendant objected to the ballots being received in evidence or counted, upon the ground that it appeared that the said ballots, and all the ballots returned to the county clerk from the several precincts of the county, had been ever since the eighth day of January, 1883, in the sole and exclusive possession of the contestant; that they had therefore not been kept by the officer to whose custody the law committed them; that they should have been kept by the county clerk, and that contestant is not and never has been the county clerk, but has intruded himself into and usurped the office without any color of right thereto.

The court overruled the objection and the ballots were then counted, the defendant reserving an exception.

We do not think the court erred in its ruling.

As soon as all the ballots are counted after an election they must be carefully sealed in a strong envelope by the officers of the election and must then be delivered to the county clerk, who is required to keep the packages unopened and unaltered for twelve months, unless within that time a contest in regard to the election is commenced and brought to trial: Political Code, secs. 1,259 to 1,266.

In case of a contest the ballots are the primary and best evidence of the number of votes received by any candidate, provided they have not in any way been tampered with; and the burden is upon the contestant to show that fact: People v. Holden, 28 Cal., 133; Coglan v. Beard, 1 West Coast Rep., 862.

After the eighth day of January, Coglan became the county clerk, *de facto* if not *de jure*, and the law gave him custody of these ballots and enjoined upon him the duty of taking care of them. This duty was performed in the interest of the public and not of himself. When the case came on for trial the fact that he had had the custody of the ballots should have led, and doubtless did lead, the court to scrutinize them with greater care than it would if they had been produced from the custody of some other person; but it did not, we think, render them wholly inadmissible as evidence. The questions were: Were they the genuine ballots cast by the voters, and had they been kept in the same condition that they were in when delivered by the officers of the election to the clerk? These questions being answered in the affirmative they were receivable in evidence. As was said in People v. Livingston, 79 N. Y., 287: "The preservation of the boxes inviolate being the ultimate object of the statute, if that is in fact accomplished, the omission to observe all the formalities to secure that object is not fatal to the evidence. Such omission would weaken the force of the evidence and induce greater caution in regarding it, but would not necessarily destroy it."

The rule, invoked by counsel for appellant, that it is only as to the public and third persons that the acts of a *de facto* officer are held valid, and that they are not valid when they are for his own benefit, does not apply here. In keeping the ballots Coglan did not act for himself, but for the public. Nor is he alone interested in the controversy. "The public is interested in a contest of this character. It is not a matter solely between the parties to the record:" Searcy v. Grow, 15 Cal., 119.

"Theoretically the people alone are interested in the determination of the controversy involved in this case:" People v. Holden, 28 Cal., 139.

3. The court admitted in evidence, against the objection of the defendant, a tabulated statement showing the result of the count by the judge on the first trial of the case of the ballots recounted on this trial, and this ruling is assigned as error.

When the tabulated statement was offered, it was admitted by counsel for defendant to be correct, and the only objection to it was that it was secondary evidence of the contents of the ballots, and that the ballots were the best and only competent evidence to impeach the returns of the precinct officers.

The principal point made by the defendant, was that Coglan had had the custody of the ballots, and had had an opportunity to manipulate, and change them, and, therefore, they were not admissible

in evidence at all; and the burden, as we have seen, was upon him to show that they had not been changed.

It would seem that anything tending to show that fact was admissible, and what more persuasive evidence could be offered than a comparison of the results of the two counts? Certainly it would seem to follow, if the results were the same, that the ballots must have remained inviolate during all the time Coglan had the custody of them.

We do not think the court erred in receiving and examining the tabulated statement showing the results of the count on the first trial.

The judgment should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

No. 9,902.

JONES v. MORGAN, TREASURER, ETC.

Department One. Filed August 18, 1885.

MANDATE AGAINST COUNTY TREASURER—PETITION—ALLEGATIONS OF WHEN SUFFICIENT.—A petition for a writ of mandate to compel a county treasurer to pay a warrant issued to the plaintiff by the county auditor, need not allege that the claim of plaintiff "was ordered paid," by the board of supervisors, if it be alleged that such board "audited and allowed said claim" and "ordered the auditor to draw his warrant in favor of the plaintiff on the defendant as treasurer," for the amount thereof. If such allegations are not denied their truth is admitted.

FINDINGS HELD SUSTAINED.—The findings that the warrant in question was the property of the petitioner; that it was duly presented to and refused payment by the defendant, and by reason of such refusal no damage had resulted to the plaintiff, *held* sustained.

SUPERVISORS—RETAINING DISTRICT ATTORNEY—CONTRACT WHEN VALID.—A board of supervisors has power to retain the district attorney of their county to attend to a case in which the county is interested, but which is to be tried in another county after his term of office should expire. Such contract is not, in effect, for an increase of the district attorney's salary, and is not void because made with the district attorney during his term of office.

APPEAL from a judgment of the superior court of Butte county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

John C. Gray, for the appellant.

T. B. Reardan & Son, for the respondent.

FOOTE, C. The plaintiff brought a petition for a writ of mandate in the superior court of Butte county against the defendant, as treasurer of that county, the object being to compel the treasurer to pay a warrant issued to the plaintiff previously by the auditor of the said county.

In referring to the action of the board of supervisors of said county, in his petition, the plaintiff, among other things, avers, "that at the said December session of said board of supervisors the said board audited and allowed said claim of plaintiff in the sum of

five hundred dollars, and ordered the auditor of Butte county to draw a warrant in favor of plaintiff on the defendant, as treasurer of said county, for said sum of five hundred dollars."

This petition was demurred to and answered at the same time.

The grounds of demurrer were "that the petition did not state facts sufficient to authorize the court to grant the writ of mandate, or to give any relief." The demurrer was overruled. A trial on the merits was then had of the case, by the court, a jury being waived.

The judgment of the court was to order a peremptory writ of mandate, as prayed for, and for costs against the defendant.

A new trial was moved for and denied. On this motion, a statement was agreed upon in open court, and by a stipulation it was afterward agreed that it should be the statement upon appeal.

From the judgment of the court, and its order denying the motion for a new trial, an appeal was taken.

The only ground relied on in argument by the appellant, to reverse the court below in its ruling on the demurrer, is that the complaint did not set out, in reference to the claim of plaintiff, "it was ordered paid" in the very language of the statute.

The complaint recited that the board of supervisors of Butte county "audited and allowed said claim of plaintiff in the sum of five hundred dollars, and ordered the auditor of Butte county to draw a warrant in favor of plaintiff on the defendant, as treasurer of said county, for said sum of five hundred dollars."

It further alleged "that on the twelfth day of December, 1884, the auditor of said county of Butte, in pursuance to said order of the said board of supervisors of said county, issued, drew and delivered to plaintiff a warrant for said sum of five hundred dollars."

The allegations in the complaint thus demurred to were, we think, entirely full and sufficient. A similar complaint to the one under discussion was held to be good by this court in the case of Connor v. Morris, 23 Cal., 451.

Upon the trial of the case at bar, it was stipulated by counsel in open court, that the only questions and issues to be submitted to the court were:

1. Is the petitioner the party beneficially interested and owner of the warrant set forth in the petition?

2. Has the warrant, set forth in the petition, been duly presented to the defendant for payment, and payment demanded thereof, and payment refused?

3. Has the plaintiff, petitioner, suffered any damage by reason of the refusal of defendant to pay the warrant set out in the petition?

4. Is the warrant, set forth in the petition, founded on a legal claim against the county of Butte?

The court found that the warrant was the property of the petitioner; that it was duly presented to and refused payment by the defendant, and by reason of such refusal to pay it, no damage had resulted to the plaintiff.

Upon the first three propositions, there can be no doubt of the correctness of the findings, and this is so plain that discussion of them is needless.

It is strenuously argued by the appellant, that the board of supervisors of Butte county, *never ordered* the claim of the petitioner to be paid, but, in his answer to the petition, he did not deny the allegations of the complaint upon that point, hence those allegations are by the pleadings, admitted to be true.

It being thus virtually admitted, by the pleadings, that the question raised by the appellant above alluded to, is without the issues to be tried, and that too by the act of the defendant, he cannot be heard to complain here.

The appellant further contends that the trial court erred, in overruling his objection to the introduction of warrant "No. 773" in evidence, but as the objector did not see proper to include in the stipulation of issues to be passed on by the court, any question as to the validity of the warrant on its face, but expressly agreed to exclude it, by agreeing that the issues thus submitted by the stipulation, were the only issues, he could not, under those issues thus limited, be heard legally to object to the introduction of the warrant in evidence, nor can we entertain such objection here.

As to the point made that the contract was void and the warrant likewise, because the petitioner sought to have his salary increased and that in allowing his claim and ordering the warrant to be drawn for it, the board of supervisors of Butte county increased his salary, it is plain from the evidence that no such thing was in contemplation, or was done.

The evidence shows that the petitioner was district attorney of Butte county up to January 5, 1885, that the board of supervisors of that county employed him to attend to a case which was not to be tried until his term of office should expire; that the case had been transferred before his employment to Sutter county, and that the petitioner was retained to go into that county and look after the case and protect the interests of Butte county. The board of supervisors in their discretion certainly had the power, in this sort of a case, to employ counsel to attend to Butte county's interests in Sutter county, and the fact that they retained their then district attorney to go out of his own county, and attend to the case like any other attorney, and agreed to pay him for it, was not an increase of his salary for anything he had done or ought to have done, or was to do while holding his office in Butte county.

But the last and most important objection raised by the defendant is, that the contract on which the claim is based is void, for the reason, as he contends, that neither the petitioner could make such a contract with the board of supervisors nor the board of supervisors with him. In this connection, it is urged that a district attorney being by law the legal adviser of the board of supervisors of his county, cannot make any contract with them as to any employ-

ment which entails any payment of money to him, other than his compensation fixed by law.

It is urged that this cannot be done because, as a county officer, the district attorney cannot contract with the board of supervisors of a county, he being like a director in a corporation or a member of a town council or a member of such board of supervisors.

The district attorney is the legal adviser of the board of supervisors of his county, and as to all cases of the county pending in the courts which it is his duty as district attorney to appear in and conduct, he can make no contract with that board to receive any compensation outside of that allowed him by law; but when it is sought by that board to secure his services as an attorney at law and the services are to be rendered outside of the county of which he is district attorney, and the contract for their rendition is made in good faith, and they are of a character for which such a board in its discretion has the lawful right to employ counsel, we are not prepared to say it cannot be done.

The case of Mayor, etc., of Niles v. Muzzy, 33 Mich., 62, is a case in point. Muzzy was an attorney at law, and also mayor and councilman of the town of Niles. While occupying the municipal office, that corporation employed him as an attorney at law through its council, to attend to a suit in which it was interested in a neighboring court. He attended to the case in that tribunal, demanded his fee, it was refused payment, and he brought suit for it.

On the part of the town the point was urged, that by reason of Mr. Muzzy being a municipal officer, he could not claim pay for his services as an attorney at law; but the supreme court of Michigan declared that he was entitled to pay for such services, as there had not been shown in the case any fraudulent or collusive conduct on his part, or that of any other of the municipal officials.

In Kansas a county attorney recovered for services performed upon an implied contract in prosecuting a criminal action, in a county of which he was not an officer, the action being one in which his county was interested: Huffman v. Board of Commissioners of Greenwood Co., 23 Kan., 281.

We hold to the doctrine held heretofore by this court in the cases of Andrews v. Pratt, 44 Cal., 317, and San Diego v. S. D. & L. A. R. R. Co., 44 Cal., 106; but they were dissimilar to the case under consideration.

The petitioner here is neither a member of the board of supervisors of a county or a stockholder or director in a railroad corporation, seeking to contract with himself on the part of the corporation or board of which he is a member.

There does not appear in the record before us any evidence that the petitioner has been guilty of the least bad faith in making his contract with the board of supervisors of Butte county, or that he or any one for him has exercised any undue influence over that board in the matter, neither is it evidenced in any way that such board of supervisors was beneficially interested in the claim, or

were actuated throughout the transaction by any motive, save that proceeding from an honest desire as guardians, so to speak, of protecting to the best of their skill and judgment the interests of said county, and in the utmost good faith toward all concerned.

We are of the opinion that the judgment and the order of the court denying a new trial ought to be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

No. 9,543.

HAGGIN v. RAYMOND ET AL.

Department One. Filed August 18, 1885.

EJECTMENT—CROSS-COMPLAINT—SPECIFIC PERFORMANCE—VERDICT ADVISORY IN EQUITY CASE.—In an action of ejectment, a cross-complaint, setting up a parol contract for a lease, and praying for the specific performance thereof, constitutes a case in equity; and the verdict of the jury, on the issues so raised, is merely advisory, and may be disregarded by the court.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

J. H. McKune, A. P. Catlin and *Elwood Bruner*, for the appellants.

H. O. & W. H. Beatty, for the respondent.

BELCHER, C. C. This is an action of ejectment. The defendants answered, admitting the plaintiff's ownership of the demanded premises, and setting up by way of cross complaint that they entered upon the premises and made valuable improvements thereon under a parol contract that the plaintiff would give them a written lease of the premises for a number of years; and they prayed for a decree compelling a specific performance of the contract.

When the case came on for trial the court ruled that the issues made by the cross complaint and the answer thereto, must be first tried and, at request of defendants, impaneled a jury to find upon those issues. At the close of defendants' testimony, the court, on motion of plaintiff, granted a nonsuit as to the cross complaint.

The defendants then waived a jury trial of the issues arising upon the plaintiff's complaint and their answer thereto, and the case was tried by the court. Judgment was rendered in favor of the plaintiff, and from that judgment and an order denying a new trial this appeal is taken.

There was no error in granting the nonsuit. The facts stated and the relief asked in the cross complaint constituted a case in equity, and it is well settled that in such a case the verdict of a jury is merely advisory and may be disregarded by the court: Bates v.

Gage, 49 Cal., 126; Johnson v. Powers, 2 West Coast Rep., 740; Sweetser v. Dobbins, 3 West Coast Rep., 616.

The court found upon all the issues raised by the complaint, the cross complaint and the answers thereto, against the defendants. It is now insisted that these findings were not justified by the evidence, and that the judgment should therefore be reversed.

We have carefully read over all the testimony found in the transcript and are unable to agree with the views of the appellants. It would subserve no useful purpose to state the testimony at length, but we think it clearly appears that Mackay, plaintiff's agent, never pretended to have any authority to make leases, even for a year, and that plaintiff never held him out as an agent for that purpose. It does not clearly appear that Mackay ever made the agreement set up in the cross complaint, and if it did there is nothing to show that the plaintiff knew of, or in any way ratified, the unauthorized act.

The defendants had a lease for the year 1882, and they paid the rents, but the fact that the plaintiff received those rents could not have the effect to ratify the alleged agreement for a lease for three years, with a privilege of two years more.

The judgment and order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

No. 9,685.

SHELDON v. MULL.

Department One. Filed August 18, 1885.

EJECTMENT—OUSTER—POSSESSION BY DEFENDANT.—To sustain an action of ejectment the defendant's possession may be sufficient to constitute an ouster, although the land in controversy had not been so inclosed as to deprive the plaintiff of the possession of the same.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

Freeman & Bates, for the appellant.

A. P. Catlin, for the respondent.

SEARLS, C. Ejectment to recover a strip of land.

The jury rendered the following verdict:

"We, the jury in the above-entitled cause, find for the defendant, on the ground that he has not had possession of any of the land sued for."

Plaintiff and defendant were adjoining owners of land.

In December, 1881, defendant constructed a fence, apparently as and for a line-fence between himself and plaintiff, but which was not on the line, being over on plaintiff's land, and leaving a narrow strip thereof on defendant's side.

The fence did not make an inclosure, extending only a portion of the way along the vicinity of the line and at the end of such fence there was an open space by which egress and ingress could be had from and to plaintiff's land.

At the trial, plaintiff asked the court to instruct the jury as follows:

"It is not necessary for the plaintiff to show that the defendant surrounded the land in controversy by an inclosure. The defendant is to be deemed to be in possession of such part of the land, if any, as he occupied and used in the same manner that owners of land of like character in that neighborhood commonly occupy and use them."

The court refused to give the instruction, which refusal was excepted to, and is assigned as error.

The court at request of defendant instructed the jury as follows:

"In order to entitle plaintiff to recover the strip of land claimed in this action it must appear to the jury from the evidence that defendant so inclosed the same as to deprive plaintiff of the possession of the same, and to appropriate the same to his own exclusive use, and that the land so inclosed belongs to plaintiff."

The giving of which is also assigned as error.

It will be preceived that by the instruction refused and the one given, the court indicated to the jury very clearly that to constitute an ouster, it was necessary that defendant should have inclosed the land in dispute so as to deprive plaintiff of the possession thereof, and in defendant's third instruction, the court told the jury they must be satisfied from the evidence that by means of fences, defendant so inclosed the strip of land, so as to deprive plaintiff of the possession of the same.

Actual possession of land may be had without fences or inclosure: McCreery v. Everding, 44 Cal., 246.

Inclosing land by a fence, is evidence of possession, but it is not the *only* evidence of possession.

He who enters upon land, occupies it, subjects it to his will and dominion for a purpose to which it is adapted, excluding all other persons therefrom, and is in the exclusive enjoyment of its advantages and products, is as much in the possession of such land as though he had inclosed it with a fence. In Sunol v. Hepburn, 1 Cal., 254, the court held that the fact that cattle and horses of a person had roamed over and grazed upon a tract of land, does not, of itself alone, make out an actual possession of the land in him.

A person, however, who marks off the boundaries of a tract of land, reasonable in extent, and habitually uses the same for pasturage of stock, confining his cattle thereon, and excluding all others therefrom, by the aid of herdsmen, employed by him for that purpose, the land being adopted to the purpose indicated, is as much in the actual possession of such land as though he had inclosed it by a fence.

"The possession to be shown in the defendant, in an action of ejectment, need not be *actual* as contradistinguished from *constructive* in its character:" Crane v. Ghiradelli, 45 Cal., 236.

In the present case, there was evidence tending to show that defendant had built his fence over the line, and upon the land, of plaintiff.

The defendant, who was a witness in his own behalf, on cross-examination, said: "Since December of last year, I have used the land, the same as before. Have run my sheep on it. I suppose the sheep run up to the new fence. I had the same use and occupation of the part up to the new fence as of any part of my place, and I claimed the right to use up to that fence. I supposed the fence was on my land. I used the part adjoining the fence the same as I used all my high land."

This testimony tended to show that defendant was in possession of the land in dispute, claiming it as his own.

The instruction refused, and those given, taken together, indicated to the jury that the evidence of possession in defendant was of no avail, and did not amount to an ouster, unless defendant had so inclosed the lands as to deprive plaintiff of the possession of the same.

This was error for which the judgment should be reversed and a new trial granted.

BELCHER, C. C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded for a new trial.

No. 9,669.

COX *v.* WOODS, ADMINISTRATOR, ETC.

Department One. Filed August 19, 1885.

REFORMATION—EVIDENCE OF MISTAKE.—The power of courts of equity to reform written instruments is one in the exercise of which great caution should be observed. Such instrument will not be reformed, on the ground that there was a mistake in drafting it, unless the evidence thereof is clear, satisfactory and free from reasonable doubt. The evidence in this case reviewed and held not to conform to this requirement.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the defendant. The opinion states the facts.

D. E. Alexander, for the appellant.

J. C. Tubbs, for the respondent.

BELCHER, C. C. Before a written instrument can be reformed, on the ground that there was a mistake in drafting it, the evidence that there was a mistake should be clear, satisfactory, and free from reasonable doubt: Wachendorf v. Lancaster et al., 61 Iowa, 509.

The power of courts of equity to reform written instruments is one in the exercise of which great caution should be observed. To

justify the court in changing the language of the instrument sought to be reformed, in the absence of fraud, it must be established that both parties agreed to something different from what is expressed in the writing, and the proof upon this point should be so clear and convincing as to leave no room for doubt: Mead v. Westchester Fire Ins. Co., 64 N. Y., 455; see also, Gillespie v. Moon, 2 Johns. Ch., 585; Hearne v. Marine Ins. Co., 20 Wall., 490.

In this case the proof was not clear and satisfactory to the court below that any mistake was made in drawing the note sued on. As written, it bore "interest at one per cent per annum," and it was claimed that the word "annum" was written by mistake in place of the word "month." The only witness called to prove the mistake, was Nichols, who wrote the note. In his examination in chief, he said: "The way I understand it, the understanding was one per cent—twelve per cent per annum; that is what I paid Cox—what I took it for. I did not notice that the word annum was in the note." In his cross-examination, he first said: "The rate of interest was twelve per cent, one per cent per month." But, when asked if he read the note to Mr. Hobbs and Mr. Cox, after he had drawn it up, he said: "Yes, I called Mr. Cox's attention particularly to the word annum in the note, and the agreement between him and Hobbs was one per cent."

This was all the testimony introduced upon the subject, and it certainly did not make the plaintiff's case so clear and convincing as to leave no room for doubt.

The last question to the witness was objected to by the plaintiff, as irrelevant and immaterial, but we think there was no error in overruling the objection.

The judgment should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

No. 9,753.

CLUNIE v. SACRAMENTO LUMBER COMPANY.

Department One. Filed August 19, 1885.

SPECIFIC PERFORMANCE—DECLARATIONS OF AGENT WHEN INADMISSIBLE.—In an action for the specific performance of a parol contract, entered into by an agent on behalf of his principal, the declarations of such agent, made a year or two after the contract, and explanatory thereof, are inadmissible against his principal.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Freeman & Bates, for the appellant.

A. P. Catlin, for the respondent.

FOOTE, C. The plaintiff seeks to enforce the specific performance of a verbal agreement, by compelling the defendant to execute a lease of certain premises for the term of five years. The findings of the court upon the facts, the evidence being conflicting, ought not to be disturbed, unless something was improperly admitted which was injurious to the defendant. It is claimed by counsel that the statements and declarations of Goodhue, the defendant corporation's manager, made after his verbal agreement to lease for his principal the premises about which this contention is had, were incompetent as evidence to bind such principal, since they were narrations of facts which occurred at the time the agreement was entered into.

The evidence discloses the fact that those declarations and statements, on the part of Goodhue, were made a year or two after the alleged parole agreement for the lease of five years was consummated by him for his principal with the plaintiff, and that they set out and stated the terms and tenor of such agreement, as understood by the parties thereto, at the time of its completion.

We are of opinion that it was not proper to admit in evidence such declarations so made by the agent, as they did not bind his principal, not being a part of the *res gestæ*, and, for this reason, the judgment and order denying a new trial should be reversed and a new trial granted.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reason given in the foregoing opinion, the judgment and order are reversed, and the cause remanded for a new trial.

No. 9,784.

CONNOR *v.* STANLEY, ADMINISTRATOR.

Department One. Filed August 19, 1885.

ACTION TO ENFORCE MARRIAGE CONTRACT—UNDUE INFLUENCE—SPIRIT MEDIUM.—In an action to enforce an alleged marriage contract, where the issues raised by the pleadings was whether or not the defendant's intestate, had in his lifetime, been in such a state of mind as to have been unduly influenced to make the contract, by the plaintiff, who claimed to be and was believed by such intestate to be a of medium communication between spirits of dead people and living persons; *Held*, that evidence as to whether, in the opinion of the witness, the defendant's intestate was liable to be unduly influenced by such spirit mediums was inadmissible.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

W. H. Beatty and *R. T. Devlin*, for the appellant.

Freeman & Bates and *Grove L. Johnson*, for the respondent.

FOOTE, C. This action was tried by a jury and the evidence before them warranted their verdict. The instructions given by the court fully and fairly stated the law of the case, and there is no ob-

jection urged on this score by the counsel for the appellant in their brief; the evidence, except as hereinafter stated, was properly submitted to the jury.

But the trial court, against the plaintiff's objection, allowed the following questions to be propounded to the witness Van Den Mark, and to be answered by him:

"Q.—State whether Mr. Jarvis was competent to make a contract with a person that he believed to be a medium of communication between spirits of dead people and living persons?

"Q.—What I mean is; do you think that he was competent to make contracts with those people that come to him and claimed to be mediums, whether or not they would have had an undue influence over him?

"A.—I think that they would make a contract; in making that contract, they would have all the influence over him, and that he would do it under their supervision."

And to the witness Peter Yager the following question was allowed to be put and answered against the objection of the plaintiff:

"Q.—Would a person professing to be a medium have more or less control over him, than a person not professing to be a medium?

"A.—Well, a person that believed in his doctrine could do almost anything with him, and a person that did not believe in spiritualism, he would not have anything to do with."

This action was brought against the administrator of the decedent Wm. Jarvis, to enforce an alleged marriage contract, by causing to be delivered to the plaintiff certain bonds, or their value to be paid her.

The issue which was raised by the pleadings and presented to the jury to be by them determined, was whether or not, the decedent had in his lifetime been in such a state of mind, as to have been unduly influenced by the plaintiff to make the contract, who, the evidence disclosed, claimed to be, and was believed by Jarvis to be, a medium of communication between spirits of dead people and living persons.

Those questions propounded to the witness above mentioned, and which were answered by them, involved the precise question which was presented by an issue to be tried by the jury, and by that means the province of that body was invaded: Walker v. Walker's Ex'rs., 34 Ala., 469, 473; People v. Westlake, 62 Cal., 305, 309.

Hence, for the reasons stated, we are of opinion that the judgment and order denying a new trial should be reversed, and a new trial granted.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

No. 20,117.

IN RE PATTERSON, ON HABEAS CORPUS.

Department Two. Filed August 20, 1885.

PETITIONER REMANDED for want of error in the proceedings.

PETITION for a writ of *habeas corpus*. The opinion states the facts.

J. Lumbert, for the petitioner.

THE COURT. The petitioner was convicted, under section 4 of the act of March 30, 1878, Statutes 1877-8, p. 813, of a misdemeanor, in having unlawfully beaten a child, and causing said child to suffer unjustifiable physical pain, and was sentenced to pay a fine and be imprisoned.

No error appears in the proceedings which would justify a discharge of the prisoner on *habeas corpus*.

The petitioner is remanded.

No. 9,522.

ESTATE OF LUTHER, DECEASED.

Department Two. Filed August 21, 1885.

ESTATES OF DECEASED PERSONS—FAMILY ALLOWANCE—ORDER REFUSING—WHEN NOT DISTURBED.—An order refusing a widow and minor children a family allowance out of the estate of the deceased, will not be disturbed, when the petition therefor fails to state that the proceeds of the homestead set apart to them were insufficient for their support.

APPEAL from an order of the superior court of Stanislaus county, denying a petition for a family allowance. The opinion states the facts.

Schell & Bond, for the appellant.

E. T. Stone, for the respondent.

FOOTE, C. Appeal from an order refusing to make a family allowance to the widow and minor children of deceased. A homestead, consisting of one hundred and twenty-five acres of farming land, also some personal property, had been set apart to the widow and children. The petition for family allowance did not contain a statement that the proceeds of the farm were insufficient. Therefore we cannot say that the court erred in refusing the allowance, and the order appealed from should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

No. 9,761.

IN RE W. B. TREADWELL.

In Bank. Filed August 22, 1885.

DISBARMENT OF ATTORNEY—PREVIOUS CONVICTION OF CRIME NOT NECESSARY—POWER OF SUPREME COURT.—The supreme court has power, under section 287 of the code of civil procedure, to disbar an attorney for official misconduct, in fraudulently appropriating to his own use moneys collected by him for his client. In the exercise of this power the court deals with the attorney only as an officer of the court in investigating charges against him for the purpose of determining whether, under the proofs, he is a fit person to be allowed to continue to practice as an attorney and counselor in the courts, under the license which has been granted him, and not for the purpose of adjudging whether he is guilty of the commission of a crime for which he ought to be convicted and punished. That can only be done in a criminal court of competent jurisdiction by due process of criminal law. Previous conviction of a crime is not necessary to a proceeding to disbar an attorney.

THE SAME.—The evidence reviewed and held that the respondent was guilty of professional misconduct as charged.

PROCEEDING for disbarment of an attorney. The opinion states the facts.

G. E. Harpham, for the petitioner.

A. C. Adams and *W. C. Belcher*, for the respondent.

MCKEE, J. This is a original proceeding to disbar an attorney at law for misconduct in office, in fraudulently appropriating to his own use moneys collected by him for his client.

The record shows that Carl Haneke had employed the attorney in a transaction which involved the sale and transfer of a tract of land in Yolo county to one Isaac Quinn. Quinn gave his promissory note for the purchase money of the land, payable in the sum of two thousand four hundred and fifty dollars, and interest thereon from date of the note, payable quarterly in advance, to Haneke, at the Bank of California, and secured its payment by a mortgage trust deed upon the land.

Note and deed were executed and delivered to Haneke on the twenty-sixth of March, 1881. Possession of the deed Haneke retained, and the note he deposited in the Bank of California for collection.

After finishing the transaction in that way, Haneke settled with the attorney and paid him for his legal services, but, under the authority of Haneke, the attorney continued to act in collecting the quarterly interest as it became due upon the note and any payments that were made of the principal sum.

Between the date of the note and the month of December, 1883, each quarterly interest of the note as it became due and four hundred dollars of the principal were collected and transmitted by the attorney to the bank, and were there properly applied to the payment of the note, and carried to the account of Haneke, who received and receipted for them. But in December, 1883, the attorney collected, in full, of the principal and interest, then due, two thousand one hundred and two dollars and sixty-one cents, for which he gave his receipt in the following words:

"$2,102 61. WOODLAND, CAL., Dec. 12, 1883.

"Received of Isaac Quinn, twenty-one hundred and two 61-100 dollars, to be applied in payment of his note of March 26, 1881, to Carl Haneke. W. B. TREADWELL."

This money he did not transmit to the bank as he had done his prior collections. Upon receiving the money he deposited it in his own name in the bank of Yolo, and used it as his own. Under oath, he admits, that within a few days after he had deposited the money he drew four hundred dollars of it, and used it for his own purposes; that within a week or ten days, he obtained from the bank a certificate of deposite for one thousand five hundred dollars of it, payable to himself or order, on return of the certificate properly indorsed; and that the balance he kept and used.

It is claimed for him, that he appropriated the money in that way by the authority and under instructions from a daughter of his client, at whose request he agreed to hold the money until an opportunity could be found for its investment in some way so that it would yield, in the way of interest, a small monthly or quarterly income for the support of her father. And that when the daughter found an investment she wrote for the money and he sent her the one thousand five hundred dollars certificate of deposit properly indorsed by himself, and at the same time borrowed from her the balance of the money at the same rate of interest that Quinn had paid on his note.

This defense rests altogether upon his own testimony. His testimony, given in his own behalf, tended to show that in March, 1883, he received from the daughter of his client a letter in the following words:

"SAN FRANCISCO, March 27, 1883.

"MR. W. B. TREADWELL—*Dear Sir:* During my father's recent dangerous illness, he deemed it advisable to arrange business matters to his satisfaction. He therefore indorsed and assigned the promissory note of the trust deed to me, and consequently I shall sign all receipts for interest or money sent as payment on note hereafter. The trustees have been duly notified of the change.

"Will you have the kindness to inform Mr. Quinn of the fact, and request him when he forwards interest again to have the check at the bank payable to me? Father is much better, but, being over eighty years of age, he does not feel able to have the cares of business thrust upon him. Hoping these few lines may find your family in good health, I remain, yours truly,

"HARRIET A. WISE,
"516 Filbert Street."

He did not inform Mr. Quinn of the request contained in the letter, but he continued to make collections from him upon the note as usual. It is true, however, that the note was withdrawn from the bank by Haneke during his sickness, and, after indorsement by him, was again returned, after which Mrs. Wise drew from and receipted to the bank for all moneys which were collected and trans-

mitted by the attorney for payment upon the note, prior to the month of December.

In connection with these facts the substance of the attorney's testimony, condensed to brevity, is this: "Before, or about the time, I collected the principal and interest due on the note, I happened to meet Mrs. Wise at the Palace Hotel in San Francisco, and there informed her that Quinn was, or would be soon, ready to take up his note. This troubled her, because, as she expressed it, her father was old, very feeble and childish, and looked to the regular payment of the interest on the note as absolutely necessary to his comfort in his declining years, and she thought it advisable that knowledge of the payment of the note should be kept from him; therefore, she 'proposed' to me, that, instead of transmitting the money to the bank, as usual, to be applied to the payment of the note, I should retain it in my possession until she or I could find some opportunity to invest it so as to make it interest-bearing; and, in the meantime, I could use the money to pay interest at the bank as usual, 'so as to have it appear that the matter was going all right.'"

After this alleged interview the attorney admits he never saw Mrs. Wise again. And the fact is, that before it became publicly known that the money had been collected, Mrs. Wise fell sick and was taken to the German Hospital where she died. But the attorney claims that, before her death, and soon after he had deposited the money in the bank of Yolo, he began a correspondence with her as to the investment of the money, in one of the letters of which he sent to her address in San Francisco, by mail, the certificate of deposit for one thousand five hundred dollars, by him, properly indorsed, and, at the same time wrote to her as follows: "As to the balance of the money I will, if satisfactory, use it myself, and pay you the same rate of interest until you can use it otherwise, or I can find some other investment." "In answer to that letter she wrote to me acknowledging the receipt of the certificate and at the same time asked me to send her two hundred dollars of the balance in my hands, if I could conveniently spare it, urging me at the same time to keep the matter open and pay the next instalment of interest at the bank. To that letter I replied 'that it was not convenient to send the two hundred dollars, but I would let her know, in a day or two, whether I could do so; and that I would attend to the payment of interest.'"

"Q.—You made an investment of the rest for her?

"A.—Yes, sir.

"Q.—Of six hundred dollars?

"A.—Yes, sir. * * * I had borrowed it myself, and had so stated in my letter; and she had agreed to it—it was agreed to by her. I was to pay the same rate of interest that Mr. Quinn had been paying until I should give it up or make some other investment."

All the letters of this asserted correspondence, says the attorney, are lost, and he testified to their contents from his recollection.

There was, of course, no explanation or contradictions of his statements by Mrs. Wise, she being dead. Upon his own testimony, therefore, as to the authority from, and correspondence with, Mrs. Wise, rests his exculpation of himself, and we regret to find that his attempted exculpation is not founded in fact.

As fact, the attorney admits the use of the money for his own purposes, except the sum of one thousand five hundred dollars, which he claims to have sent to Mrs. Wise. But it is a fact that Mrs. Wise never received the certificate of deposit, nor had it cashed by any one for her. On the contrary, the evidence proves, beyond a reasonable doubt, that, on the day after the attorney obtained the certificate from the Bank of Yolo, he was in San Francisco, and on the next day, between the hours of 12 M. and 1 P. M., he, in person, presented the certificate to the Bank of California, properly indorsed by him, and received for it a cash payment and a certificate of deposit for one thousand two hundred dollars, payable to himself, upon his indorsement, on which he soon afterwards received the money from the Bank of Woodland, and used it. It follows that Mrs. Wise never received from the attorney any of the two thousand one hundred and two dollars collected by him. In fact, the non receipt of any portion of the money increased her sorrows and served to embitter her last days. The attorney, therefore, held back the entire sum which he collected, and used it for his own purposes, under circumstances which make his conduct inexcusable and unprofessional.

The attorney admitted "that it was wrong to use the money, but he supposed that he could replace it whenever they wanted it, knowing that they wanted it kept out at interest." His good intentions, however, neither excuse nor mitigate his official conduct. As a lawyer, he knew that he could not professionally enter into a secret arrangement to conceal from his client a knowledge of the collection of the money, and that, even under the color of such an arrangement, assuming that such had been made, it was not allowable for him to deal with the money in such a way as to injuriously involve the rights of others standing in such a relation to it as to be affected by an unauthorized and unlawful use of it, nor to convert it to his own use. He knew that it was a duty which he owed to himself, his client and the man from whom he had collected the money, to pay it over as soon as he received it, by transmitting it to the bank where the note was deposited, and where it would be properly applied to the credit of the note, and turned over to the account of the owner. In failing to discharge that duty, and in converting the money to his own use, he violated his oath of office and abused his trust.

As to the power of the court to strike the name of an attorney from the roll of attorneys and counselors of the court for such official misconduct, there is no question. Section 287, code of civil procedure, provides: "An attorney and counselor may be removed

or suspended by the supreme court, * * * for either of the following causes arising after his admission to practice:

"1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction is conclusive evidence.

"2. * * * Any violation of the oath taken by him, or of his duties, as such attorney and counselor."

In the exercise of this power the court deals with the attorney only as an officer of the court in investigating charges against him for the purpose of determining whether, under the proofs, he is a fit person to be allowed to continue to practice as an attorney and counselor in the courts under the license which has been granted to him, and not for the purpose of adjudging whether he is guilty of the commission of a crime for which he ought to be convicted and punished. That can only be done in a criminal court of competent jurisdiction by due process of criminal law. Previous conviction of a crime is not necessary to a proceeding to disbar an attorney. If an attorney be found by a court guilty of acts indicating professional moral depravity, the court can, without previous conviction of a criminal offense, prevent the repetition of such official acts, by taking away the license under which they have been committed. This it will do not only in the interest of justice and of the public, but of the legal profession, which, like the court itself, ought to be free from all suspicion. "It is indispensable that an attorney be trustworthy. And he is not trustworthy if he is capable of improperly applying to his own use his client's money, whether he intends to return it or not:" Delano's Case, 58 N. H., 5.

It is ordered that the name of the attorney be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney and counselor in any of the courts of the state.

ROSS, J., MYRICK, J., MORRISON, C. J., THORNTON, J., and MCKINSTRY, J., concurred.

No. 20,030.

EX PARTE LICHENSTEIN, ON HABEAS CORPUS.

In Bank. Filed August 22, 1885.

PAWNBROKERS—ACT LIMITING RATE OF INTEREST CONSTITUTIONAL—SPECIAL LEGISLATION.—The act of March 7, 1881, amending section 340 of the penal code, and prohibiting pawnbrokers from charging a larger rate of interest than two per cent per month on loans made by them, is not a special law, and, consequently, is not in conflict with the provision of article iv., section 25, of the constitution of 1879, which prohibits the legislature from passing any local or special law regulating the rate of interest on money.

PETITION for a writ of *habeas corpus*. The opinion states the facts.

Chas. B. Darwin, for the petitioner.

J. D. & D. T. Sullivan, for the respondent.

MORRISON, C. J. The petition for a writ of *habeas corpus* in this case, sets forth "that a complaint was filed against the petitioner in the police court of the city and county of San Francisco, charging that he was engaged in and was conducting the business of a pawnbroker in said city, and as such received from a person therein named one gold watch as a pledge in consideration of a loan of thirty dollars, and did then and there unlawfully and willfully charge on said loan a rate of interest in excess of two per cent per month, to wit, interest at the rate of four per cent per month, and thereupon the petitioner was brought before said police court, was tried and convicted and sentenced on said charge. Defendant thereupon appealed from said judgment of conviction to the superior court of the city and county of San Francisco, where said judgment was duly affirmed." It is claimed that the petitioner is unlawfully restrained of his liberty because the act under which he was prosecuted is unconstitutional and void. The following is the law for a violation of which petitioner was convicted:

"Section 340 of the penal code is hereby amended so as to read as follows:

"Every pawnbroker who charges or receives interest at the rate of more than two per cent per month, or who, by charging commissions, discount, storage or other charge, or by compounding, increases or attempts to increase such interest is guilty of a misdemeanor."

Section 340 of the penal code, which was passed before, and was in force when, the new constitution went into effect, prohibited pawnbrokers from receiving a greater rate of interest on loans than four per cent per month. The contention is that the last act on this subject, and the one under which the prosecution in this case was had, and which was approved March 7, 1881, is in violation of certain provisions of article iv., section 25, of the constitution. The following are the provisions said to be violated:

"The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say, second, For the punishment of crimes and misdemeanors.

"Twenty-third, regulating the rate of interest on money."

This case really turns upon the second prohibition above referred to, because if the legislature had the right to prohibit pawnbrokers from charging a larger rate of interest than two per cent per month on loans made by them, it had a right to punish parties who violated the law, otherwise it would be a law without a sanction to enforce it.

By section 2 of article 1 of the old constitution it was provided that "all laws of a general nature shall have a uniform operation," and by the act of 1861, referred to above, the rate of interest which pawnbrokers were allowed to charge was regulated by a law applicable solely to that class of money-lenders. In the case of Jackson v. Shawl, 29 Cal., 267, the constitutionality of that law was attacked on the ground that it was a special law, not uniform in its operation,

but the court upheld it. The court there says: "The constitutional objection which is made to this act of the legislature has been settled adversely to the views of the defendant by several cases (naming them), and it is only necessary for us to say we are satisfied with the general doctrine of these cases respecting the clause of the constitution in question, and therefore hold the objection made to the statute to be invalid."

In the case of *ex parte* Koser, 60 Cal., 177, involving the constitutionality of the so-called Sunday law, one objection made to the law was that it was in violation of section 25, article ii., of the present constitution, inasmuch as it was a special law for the punishment of crimes and misdemeanors, which the legislature was prohibited from passing. The law was sustained, and Mr. Justice Thornton, in delivering the main opinion of the court, says:

"Certainly the legislature is intrusted with an enlarged discretion to determine what shall be punished criminally, and what shall not be, to fix upon what shall be put in the class of *mala prohibita*, and what shall not be included. It is consistent with this view to conclude and hold that such a law is a general one, uniform in its operation, and that by it no privilege or immunity is granted so as to bring it in conflict with the clause of the constitution above referred to."

Accepting the foregoing as a correct definition of a general law, we think the act in question may be sustained. It applies to all persons in this state engaged in the business of licensed pawnbrokers, and makes all persons engaged in that business amenable to its provisions. And, if we look into the reason of the law, it is not without good and valid reasons to support it. It is well known that persons frequenting the offices of pawnbrokers are generally the reckless and needy and improvident, who require the protection of the law. To no other class of money lenders do the same reasons apply. Men driven by the necessities of their situation resort to the pawnbroker, and pledge any and all articles in their possession in order to raise money, and they are not particular about the rate of interest charged them. The pawnbroker also does a business peculiar to himself. He *always* requires a deposit as security for the amounts loaned, which are usually small, and, in that respect at least, his is a business not carried on by any other person in the state. Pawnbrokers are not allowed to do a certain act because the legislature, in its wisdom, deemed it injurious and harmful to the community to permit them to do the prohibited act, but the like necessity for a rule of prohibition did not, in the opinion of the law-making power, apply to any other class of persons in the community. It is only in cases where an act of the legislature clearly violates a provision of the constitution that a court is justified in setting it aside, and we cannot say that the act in question is such.

Writ dismissed and petitioner remanded.

MYRICK, J., THORNTON, J., and MCKINSTRY, J., concurred.

No. 9.769.

TRYON v. HUNTOON, ADMINISTRATOR, ET AL.

Department One. Filed August 22, 1885.

TRUST—CONSIDERATION MOVING FROM ANOTHER—PRESUMPTION MAY BE REBUTTED.—When a transfer of real property is made to one person, and the consideration thereof is paid by or for another, the presumption, under section 853 of the civil code, that a trust is created in favor of the person by or for whom such payment is made, may be rebutted by evidence that the intention of the parties was otherwise. The evidence in this case reviewed and held sufficient to sustain the findings that no trust was created.

DEED—DESCRIPTION--UNCERTAINTY—COLOR OF TITLE—STATUTE OF LIMITATIONS.—A deed which describes the land intended to be conveyed as "three fractions of lot 7, J and K, Fourth and Fifth streets, Sacramento city," is void for uncertainty, but is sufficient to give color of title, so that possession under it will create a perfect title by operation of the statute of limitations.

QUIETING TITLE—HEIRS MAY MAINTAIN ACTION—Under section 1,452 of the code of civil procedure, the heirs at law of a deceased intestate may, in their own name, maintain or defend an action to quiet title to land, without joining the administrator of the estate of the deceased.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

McKune & George, for the appellants.

Hart & White, for the respondents.

Young & Young, for the administrator.

SEARLS, J. Action to quiet title to the west twenty feet of lot number six, and the east five feet of lot number seven, in the block, or square, bounded by Fourth and Fifth, J and K streets, Sacramento.

Plaintiff had judgment, and defendant moved for a new trial, pending which motion, J. S. Huntoon, administrator, of the estate of E. L. Billings, deceased, one of the defendants, consented to the dismissal of the action as to him. The motion was overruled as to the defendants, L. N. Billings and D. D. Billings, who appeal from the judgment, from the order denying the motion for new trial, and from the order dismissing, as to Huntoon, the motion for new trial.

E. L. Billings, who was a brother of appellants and respondent, died intestate in Sacramento, January 23, 1883. He was a native of Canada, and came to California in 1852, where he accumulated a large property and continued to reside until his death.

When E. L. Billings was about to come to California, his sister, the plaintiff, then twenty-one years of age, and unmarried, was engaged in teaching school at eight dollars per month.

From her slender earnings she furnished him one hundred dollars, to assist him in defraying the expenses of his journey. In 1858, according to the findings of the court, E. L. Billings procured the owners of the land in dispute to convey the same to his sister, the plaintiff herein, for a consideration of seven thousand dollars, which was paid by him.

Before that time, viz.: on the twenty-first day of November, 1855, said E. L. Billings had procured the then owners of the premises to convey, and they had conveyed the undivided one-half of said premises to plaintiff, the consideration for which was paid by Billings.

Plaintiff was, at that time, in Vermont, and knew nothing of the conveyance to her until informed thereof by deceased, who, at the same time, requested a power of attorney from her, authorizing him to take possession of, lease and sell all lands which she had or might thereafter have in Sacramento city. She executed and returned to deceased the power of attorney.

The question in the court below was as to the nature of the transactions by which title to the property vested in plaintiff. She claims the property was conveyed to her as a gift from her brother on account of the love and affection he bore her, while defendants, on the other hand, assert that the property was only conveyed to her as a convenience, and as a precaution against unforeseen misfortunes in business, and that deceased having advanced the purchase money, plaintiff took the legal title in trust for him.

Under section 853 of the civil code, it is provided that "when a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

This presumption, raised by law in favor of him by whom or for whom payment is made, is based upon the fundamental idea that the parties *must have intended* that he by whom or for whom the purchase price of land is paid should have an equitable interest therein.

Experience has found this intention to appear so uniformly in such cases, as to warrant the inference or presumption of its existence in all cases. The only effect of this presumption is that it arises upon proof of the facts upon which it is predicated without further proof as to what the real intention of the parties may have been, but it is not an irrebutable presumption. It may be removed or overcome by proof—by showing that between him who advanced the consideration and the grantee, it was *not intended* that a trust should arise in favor of the former.

That was the precise point to which evidence was introduced at the trial of this cause and the findings of the court below are in favor of the plaintiff on all the issues.

We think there was testimony in favor of plaintiff sufficient to support these findings.

It would seem that plaintiff was the favorite sister of deceased. She furnished him, in part at least, with the means to come to California. It was with her he corresponded, and from her he sought and obtained information in reference to the other members of his family.

Bound to her by ties of affection as well as of blood, and under obligations to her for the aid which made his success in life possible, it is not deemed strange, when fortune had favored him, the deceased was disposed to place in the name of this valued sister the property involved in this action, in order that, in case of death, she might to that extent be preferred to the large number of his other heirs. Under such circumstances, we cannot interfere with the findings of fact.

It is objected that the title to the east five feet of lot seven never vested in plaintiff.

No. 20,117.

IN RE PATTERSON, ON HABEAS CORPUS.

Department Two. Filed August 20, 1885.

PETITIONER REMANDED for want of error in the proceedings.

PETITION for a writ of *habeas corpus*. The opinion states the facts.

J. Lambert, for the petitioner.

THE COURT. The petitioner was convicted, under section 4 of the act of March 30, 1878, Statutes 1877-8, p. 813, of a misdemeanor, in having unlawfully beaten a child, and causing said child to suffer unjustifiable physical pain, and was sentenced to pay a fine and be imprisoned.

No error appears in the proceedings which would justify a discharge of the prisoner on *habeas corpus*.

The petitioner is remanded.

No. 9,522.

ESTATE OF LUTHER, DECEASED.

Department Two. Filed August 21, 1885.

ESTATES OF DECEASED PERSONS—FAMILY ALLOWANCE—ORDER REFUSING—WHEN NOT DISTURBED.—An order refusing a widow and minor children a family allowance out of the estate of the deceased, will not be disturbed, when the petition therefor fails to state that the proceeds of the homestead set apart to them were insufficient for their support.

APPEAL from an order of the superior court of Stanislaus county, denying a petition for a family allowance. The opinion states the facts.

Schell & Bond, for the appellant.

E. T. Stone, for the respondent.

FOOTE, C. Appeal from an order refusing to make a family allowance to the widow and minor children of deceased. A homestead, consisting of one hundred and twenty-five acres of farming land, also some personal property, had been set apart to the widow and children. The petition for family allowance did not contain a statement that the proceeds of the farm were insufficient. Therefore we cannot say that the court erred in refusing the allowance, and the order appealed from should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

No. 9,761.

IN RE W. B. TREADWELL.

In Bank. Filed August 22, 1885.

DISBARMENT OF ATTORNEY—PREVIOUS CONVICTION OF CRIME NOT NECESSARY—POWER OF SUPREME COURT.—The supreme court has power, under section 287 of the code of civil procedure, to disbar an attorney for official misconduct, in fraudulently appropriating to his own use moneys collected by him for his client. In the exercise of this power the court deals with the attorney only as an officer of the court in investigating charges against him for the purpose of determining whether, under the proofs, he is a fit person to be allowed to continue to practice as an attorney and counselor in the courts, under the license which has been granted him, and not for the purpose of adjudging whether he is guilty of the commission of a crime for which he ought to be convicted and punished. That can only be done in a criminal court of competent jurisdiction by due process of criminal law. Previous conviction of a crime is not necessary to a proceeding to disbar an attorney.

THE SAME.—The evidence reviewed and held that the respondent was guilty of professional misconduct as charged.

PROCEEDING for disbarment of an attorney. The opinion states the facts.

G. E. Harpham, for the petitioner.

A. C. Adams and *W. C. Belcher*, for the respondent.

MCKEE, J. This is a original proceeding to disbar an attorney at law for misconduct in office, in fraudulently appropriating to his own use moneys collected by him for his client.

The record shows that Carl Haneke had employed the attorney in a transaction which involved the sale and transfer of a tract of land in Yolo county to one Isaac Quinn. Quinn gave his promissory note for the purchase money of the land, payable in the sum of two thousand four hundred and fifty dollars, and interest thereon from date of the note, payable quarterly in advance, to Haneke, at the Bank of California, and secured its payment by a mortgage trust deed upon the land.

Note and deed were executed and delivered to Haneke on the twenty-sixth of March, 1881. Possession of the deed Haneke retained, and the note he deposited in the Bank of California for collection.

After finishing the transaction in that way, Haneke settled with the attorney and paid him for his legal services, but, under the authority of Haneke, the attorney continued to act in collecting the quarterly interest as it became due upon the note and any payments that were made of the principal sum.

Between the date of the note and the month of December, 1883, each quarterly interest of the note as it became due and four hundred dollars of the principal were collected and transmitted by the attorney to the bank, and were there properly applied to the payment of the note, and carried to the account of Haneke, who received and receipted for them. But in December, 1883, the attorney collected, in full, of the principal and interest, then due, two thousand one hundred and two dollars and sixty-one cents, for which he gave his receipt in the following words:

No. 20,117.

IN RE PATTERSON, ON HABEAS CORPUS.

Department Two. Filed August 20, 1885.

PETITIONER REMANDED for want of error in the proceedings.

PETITION for a writ of *habeas corpus*. The opinion states the facts.

J. Lumbert, for the petitioner.

THE COURT. The petitioner was convicted, under section 4 of the act of March 30, 1878, Statutes 1877-8, p. 813, of a misdemeanor, in having unlawfully beaten a child, and causing said child to suffer unjustifiable physical pain, and was sentenced to pay a fine and be imprisoned.

No error appears in the proceedings which would justify a discharge of the prisoner on *habeas corpus*.

The petitioner is remanded.

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APPEAL from an order of the superior court of Stanislaus county, denying a petition for a family allowance. The opinion states the facts.

Schell & Bond, for the appellant.

E. T. Stone, for the respondent.

FOOTE, C. Appeal from an order refusing to make a family allowance to the widow and minor children of deceased. A homestead, consisting of one hundred and twenty-five acres of farming land, also some personal property, had been set apart to the widow and children. The petition for family allowance did not contain a statement that the proceeds of the farm were insufficient. Therefore we cannot say that the court erred in refusing the allowance, and the order appealed from should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

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THE SAME.—The evidence reviewed and held that the respondent was guilty of professional misconduct as charged.

PROCEEDING for disbarment of an attorney. The opinion states the facts.

G. E. Harpham, for the petitioner.

A. C. Adams and *W. C. Belcher*, for the respondent.

MCKEE, J. This is a original proceeding to disbar an attorney at law for misconduct in office, in fraudulently appropriating to his own use moneys collected by him for his client.

The record shows that Carl Haneke had employed the attorney in a transaction which involved the sale and transfer of a tract of land in Yolo county to one Isaac Quinn. Quinn gave his promissory note for the purchase money of the land, payable in the sum of two thousand four hundred and fifty dollars, and interest thereon from date of the note, payable quarterly in advance, to Haneke, at the Bank of California, and secured its payment by a mortgage trust deed upon the land.

Note and deed were executed and delivered to Haneke on the twenty-sixth of March, 1881. Possession of the deed Haneke retained, and the note he deposited in the Bank of California for collection.

After finishing the transaction in that way, Haneke settled with the attorney and paid him for his legal services, but, under the authority of Haneke, the attorney continued to act in collecting the quarterly interest as it became due upon the note and any payments that were made of the principal sum.

Between the date of the note and the month of December, 1883, each quarterly interest of the note as it became due and four hundred dollars of the principal were collected and transmitted by the attorney to the bank, and were there properly applied to the payment of the note, and carried to the account of Haneke, who received and receipted for them. But in December, 1883, the attorney collected, in full, of the principal and interest, then due, two thousand one hundred and two dollars and sixty-one cents, for which he gave his receipt in the following words:

THE MONEYS TO BE ASSESSED, upon the property benefited, for opening Montgomery avenue, constitute no part of the corporate funds of the city.

WHO NOT CITY OFFICERS.—Parties performing duties, by authority of a special statute, without the authority of a municipal corporation, and not acting by virtue of any powers conferred on the corporation by its charter, or otherwise, do not act as officers, or agents, of the corporation; and the corporation, not being the principal, their acts, so performed, are not the acts of the corporation.

Before FIELD, circuit justice, and SAWYER, circuit judge.

D. L. Delmas, *A. L. Rhodes*, and *J. P. Hoge*, for the plaintiff.

Garber, *Thornton & Bishop*, for the defendant.

BY THE COURT, FIELD, CIRCUIT JUSTICE. This is an action against the city and county of San Francisco to compel the payment of twenty coupons for interest, each amounting to thirty dollars, attached to certain instruments designated in the pleadings as Montgomery avenue bonds. The plaintiff prays for judgment that the coupons are valid obligations of the city and county; that there is due by it upon each of them the sum of thirty dollars, with interest from the date of its maturity at the rate of seven per cent per annum; that the city and county pay the amount thus adjudged due from the special tax to be annually levied, assessed and collected for that purpose, pursuant to the act of the legislature of April 1, 1872; and that the plaintiff recover against it for the costs of this action.

The validity of the bonds, to which the coupons are attached, and, of course, the validity of the coupons also, depends upon that act, and the compliance in their issue with its requirements. The object of the act was to open and establish a public street in the city and county of San Francisco, to be called Montgomery avenue, and to take private lands therefor. It described a strip of land by metes and bounds, and declared that it was taken and dedicated for such street, and that when paid for, the title thereto should vest in the city and county for that purpose, as the title of other public streets was vested. It provided that the value of the property taken, the damages to improvements thereon, or adjacent thereto, and all other expenses incidental to the proceeding, should be considered the cost of the opening of the avenue, and should be assessed upon lands within a described district in proportion to the benefits accruing therefrom, to be ascertained by a board of public works created for that purpose. That board was to consist of the mayor, the tax collector and the surveyor of the city and county of San Francisco; and, whenever the owners of a majority in frontage of the property, which was to bear the burden of the improvement, as they were named in the last preceding annual assessment roll for the state, city and county taxes, should petition the mayor of the city and county, in writing, for the opening of the avenue according to the provisions of the act, the board was to proceed to organize by the election of a president, and then to the performance of its prescribed duties. It was, among other things, to ascertain and report the cash value of the land taken; and the damages caused to the property along the line and within the course of the avenue; also, the benefits accruing from its opening to the lots within the prescribed district.

The report was to remain at the office of the board for thirty days for the inspection of parties interested, and notice that it was thus open for inspection was to be published for twenty days in two daily papers in the city and county. Any person interested who was aggrieved by the action of the board, *as shown in its report*, might, within the thirty days, apply by petition to the county court, setting forth his interest in the proceedings, and his objections thereto, for an order on the board to file with the court its report, with such other documents or data as might be pertinent thereto, which were used by it in preparing the report. And the court was authorized to hear the petition, and the board could appear in response to it, and testimony could be taken in the matter. After hearing and consideration, it was in the discretion of the court to approve and confirm the report, or to refer it back to the board, with directions to alter or modify it in specified particulars. From the order of the county court, an appeal could be taken to the supreme court of the state, to review the matters complained of. Upon the final confirmation of the report, the board was required to prepare and issue bonds in sums of not less than one thousand dollars each, for the amount necessary to pay and discharge all the damages, costs and expenses incurred. These bonds were to be known and designated as the Montgomery avenue bonds, and made payable in thirty years from their date, and to bear interest at the rate of six per cent per annum, payable semi-annually at the office of the treasurer of the city and county. Coupons for the interest were to be attached to each bond The bonds were to be signed by all the members of the board, and its seal was to be affixed to each. The coupons were to be signed by the president.

Any person to whom damages for lands were awarded, upon tendering to the board a satisfactory deed of conveyance of the property to the city and county, was entitled to have bonds issued to him equal to the amount awarded. The act also provided for the assessment and levy of an annual tax upon the property benefited, for the payment of interest upon the bonds, and to create a sinking fund for the redemption of the principal, the assessment to be "adjusted and distributed according to the enhanced values" of the respective parcels of land, as fixed in the final report of the board.

But the act declared that the *city and county of San Francisco should not, in any event whatever, be liable for the payment of the bonds, nor any part thereof, and that any person purchasing them, or otherwise becoming the owner of any bond or bonds, accepted the same upon that express stipulation and understanding.*

The following is a copy of one of the bonds and coupons issued under the act. The others are similar in form, differing from each other only in their number.

STATE OF CALIFORNIA

BOARD OF PUBLIC WORKS

City and county (Number 205) San Francisco.

(Vignette.)

$1,000. MONTGOMERY AVENUE BOND. $1,000.

In Conformity

with an act passed by the people of the state of California, represented in senate and assembly, entitled an act to open and establish a public street in the city and county of San Francisco to be called Montgomery avenue and to take private lands therefor, approved April 1, 1879, the treasurer of the city and county of San Francisco, state of California, will pay at his office in said city and county, to the holder hereof, one thousand dollars in United States gold coin, with interest at the rate of six per cent per annum, payable semi-annually in like gold coin, upon surrender of the corresponding coupons, and that the principal sum is redeemable within thirty years from the date of these presents.

It being understood and agreed that this bond may be redeemed by said treasurer as provided in said above mentioned act of the legislature of the state of California.

In witness whereof the mayor, the tax collector and city and county surveyor of said city and county of San Francisco, composing a board of public works, have respectively signed these presents and the president of the board of public works has signed the annexed coupons as of the first day of January, 1873.

{ Seal of the Board of public works. }

WILLIAM ALVORD,

President of the board of public works and mayor of the city and county of San Francisco.

ALEXANDER AUSTIN,

Tax collector and member of said board of public works.

RICHARD H. STRETCH,

City and county surveyor and member of said board of public works.

$30. Board of Public Works. Coupon No. 15.

Montgomery M. A. B. Av. Bond. } The treasurer of the city and county of San Francisco will pay bearer, at his office, thirty dollars, six months' interest.

On bond No. 612. } { Due 1st January, 1881.

WM. ALVORD,

President of board of public works.

From this brief statement of the act of April 1, 1872, three things distinctly appear: 1st, that the petition of the owners of a majority in frontage of the property to be charged with the cost of the improvement was essential to the validity of all subsequent proceed-

ings taken for the opening of the avenue, including, of course, the issue of the bonds; 2d, that in no event could the city and county be held liable on the bonds, and necessarily, therefore, not on the coupons attached, and 3d, that every person purchasing or becoming the owner of any bond took the same on that express stipulation and understanding.

The act in question was before the supreme court of the state, and the subject of exhaustive consideration in Mulligan v. Smith, 59 Cal., 206. That was an action of ejectment to recover land claimed by the plaintiff under a deed executed to him upon a sale of the premises for the non-payment of a tax levied thereon to raise a fund to pay the interest on the bonds. In the lower court, evidence was introduced which tended to show that the petition to the mayor, which was the essential initiatory step to the proceedings for opening the avenue, had not been signed by the owners of a majority in frontage of the property to be charged, as shown by the names on the assessment roll of the previous year; and the court found that such was the fact. In the supreme court, it was contended, as it had been in the court below, that evidence to impeach the correctness of the petition in this respect was inadmissible; and, also, that as the petition was sufficient on its face, and had been accepted by the mayor as sufficient, the defendant was estopped from questioning its validity, or the validity of the proceedings under it; and, also, that such estoppel followed from the judgment of the county court confirming the report of the board. But the supreme court held the evidence admissible, and that the defendant was not estopped from showing the insufficiency of the petition, either by the action of the mayor in accepting it, or the judgment of the county court; that whilst it might be true that the mayor was called upon in the first instance to decide upon the sufficiency of the petition, there was nothing in the statute which made his determination conclusive, and precluded an inquiry into its validity whenever the proceedings under it came up for judicial consideration. In no part of the statute, said the court, did it appear that provision was made for notice to the property owners of the proceedings authorized to be taken before the mayor or by the board or in the county court. Neither the mayor nor the board was required to give notice of any kind until the board had completed the report of its work. And the notice then required was one of a general nature by publication, and was only that the report was open for inspection. Though any property owner aggrieved by the action or determination of the board, as shown in its report, could have made his objections to the county court, they could not extend to the character or sufficiency of the petition. "Nowhere in the statute," said the court, "is the petition made part of the report or of the data or documents used in making it. Nor is it anywhere required that the board or the mayor shall return it to the court or file it there or elsewhere. The court had, therefore, no jurisdiction of the petition; no power to adjudge upon

its execution, and it could not assume jurisdiction of it or by its judgment decide upon its sufficiency and validity so as to conclude the defendant." These conclusions of the court were concurred in by all its members, and sustained in separate opinions of marked ability and learning by three of them. All agreed that evidence to show the defect in the petition, in not being signed by owners of a majority in frontage of the property to be charged, was admissible, and that the defect existing invalidated all the subsequent proceedings. "When, therefore," said the court, "the legislature prescribed that a petition from the owners of a majority in frontage of the property to be charged with the cost of the improvement was necessary to set the machinery of the statute in motion, no step could be taken under the provisions of the statute until the requisite petition was presented. It was the first authorized movement to be made in the opening of the avenue. When taken, officers, who were to constitute and organize a board of public works, were authorized to organize. Until it was taken, they had no such authority. They could not legally act at all; or, if they acted, their proceedings would be unauthorized and void. The presentation of the petition required by the statute, was, therefore, essential."

The authorities, cited in the several opinions, show that similar conclusions have been reached by the highest courts of other states, in analogous cases. Indeed, the rule is fundamental, that where private property is to be taken for a public improvement upon the petition of a majority of those who are to bear its burden, the petition of such a majority must be made before proceedings for the appropriation of the property can be had. This is a condition which must be strictly followed. A failure to comply with it will vitiate all subsequent proceedings. No one, indeed, would contend that proceedings had, in such cases, without the petition of any of the owners, would be valid; and a petition of a less number of the owners than that designated by the statute, would be equally ineffectual. If one less than the required number may be omitted, so may all. Nor is the rule at all affected by the doctrine that in a certain class of cases, evidence of such compliance is conclusively found in the action of officers required to consider and determine that fact. That doctrine, as we shall presently see, only applies to estop the obligors of a bond, and can have no bearing or consideration in the present case, where the bonds, to which the coupons in controversy are attached, are neither in form nor in law the obligations of the city and county.

The construction given by the supreme court of the state, to the act of April 1, 1872, if not absolutely binding upon the judges of the federal courts, in cases arising under it, is certainly not to be disregarded and rejected, except for the most cogent and persuasive reasons, such as would leave little doubt of the error of the state court. Conflicts between state and federal tribunals, in the interpretation of state statutes, are always to be avoided if possible. The federal courts will, therefore, follow the exposition of the state

courts, unless it conflicts with, or impairs the efficiency of some principle of the federal constitution, or of a federal statute, or a rule of commercial or general law. In this case, there is no such conflict or impairment. No principle of federal law is invaded, or rule of commercial or general law disregarded. The construction given, is one we should unhesitatingly adopt, had the supreme court, the legitimate expounder of state statutes, never spoken on the subject.

There was, it is true, an intimation by one of the judges, in his opinion in Mulligan v. Smith, that in an action upon the bonds, that being an action upon contract, a different rule might exist, and that an estoppel might arise against the defendant. It was, however, only an intimation to mark a possible distinction in the proofs required in the two forms of action. No question as to the effect of the bonds as evidence was before the court. And it is plain that if, to recover in the ejectment, it was essential to establish the validity of the proceedings leading to the levy of the tax to pay the interest on the bonds, it must be essential to establish the validity of the proceedings leading to the issue of the bonds themselves, and, of course, the sufficiency of the petition upon which the proceedings were founded, unless such sufficiency is, from the character of the instruments, and the recitals in them, to be conclusively presumed. In the ejectment case, a comparison of the petition with the assessment roll of the previous year disclosed the fact that a number less than the majority of the owners in frontage, as shown by the names on the assessment roll, appeared on the petition. The subsequent proceedings were, therefore, from this defect, wholly unauthorized. The essential initiative to them had never been taken.

The question here is, whether, assuming that an action will lie against the city and county on the coupons, will the sufficiency of the petition be presumed; or what will amount to the same thing, will the defendant be estopped from denying its sufficiency, so as to allow the admission in evidence of the coupons, without other proof than the production of the bonds to which they were attached.

There are numerous cases where municipal bonds have been authorized by statute, upon a vote of a majority of the citizens of a city, county, town, or other locality, and officers designated to ascertain and report as to the vote taken, and issue the bonds. When, in such cases, the bonds refer to the statute, and recite a compliance with its provisions, and have passed, for a valid consideration, into the hands of *bona fide* purchasers, without notice of any defect in the proceedings, the obligors have been held to be estopped from denying the correctness of the recitals. The doctrine on this subject is well stated by the supreme court of the United States in the recent case of Pana v. Bowler, 107 U. S., 539. "This court," is the language used, "has again and again decided that if a municipal body has lawful power to issue bonds, or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constit-

uent body, the holder in good faith has the right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds by the authorities whose primary duty it is to ascertain it."

This doctrine is not accepted in many of the state courts, and has in some instances met with earnest dissent from judges of the supreme court. It must, however, be conceded that it is the settled doctrine of that court; but to its application the recitals must clearly import a compliance with the statute under which the bonds were issued. If fairly construed they are consistent with any other interpretation, they will not estop the municipal corporation in whose name they are made from showing that they were issued without authority of law: School district v. Stone, 106 U. S., 186; Supervisors of Carroll county v. Smith, 11 U. S., 556. And the recitals when full will estop only the obligors of the bonds; they cannot estop others who are not parties to them; they cannot affect strangers to the transaction. In both particulars the alleged recitals in the avenue bonds, are inoperative to create any estoppel against the city and county. There is no statement of any fact in the clause called a recital. The clause is a mere caption to an order or promise of the board of public works that the treasurer of the city and county of San Francisco will pay to the holder the sum of one thousand dollars. "In conformity with the act," the title of which is given, says the instrument, "the treasurer will pay." Read in connection with what follows, it imports that the treasurer will pay the amount designated in accordance with the act, that is, out of the fund to be provided by it, and that the holder can look to no other source of payment. There is nothing in the clause which would reach the petition and import that it had conformed to the requirements of the statute. But the fact which disposes of this question of recitals and any alleged effect attributed to them in the present case, is that the so-called bonds, to which the coupons in controversy were attached, are not obligations of the city and county. They are not executed by it, or under its seal, or by its agents or officers, but by certain parties constituting the board of public works. The fact that certain officers of the city and county are made members of the board to appraise the property taken, and the injuries and benefits caused by the opening of the avenue, does not constitute them agents of the city and county and render their work as such board the work of the city and county; no more than if they were constituted a board to establish an university, and prescribe the studies to be pursued in it, would make them the agents of the municipality for that purpose. Agents can only exercise the powers of their principals; they cannot lawfully exceed them. Here the city and county as a municipality is not authorized to open the avenue, to appraise the value of the property taken, or the amount of injuries received by or benefits conferred upon the owners of property along the line of the avenue, or to sign and issue its bonds to the parties injured. In all these matters the board acts inde-

pendently of the municipality. It is made the agent of the state to carry out a public improvement directed by its statute, and not the agent of the city and county.

The foundation upon which the doctrine of estoppel from recitals in municipal bonds rests, is that the officers signing the bonds and inserting the recitals, are agents of the municipality, and authorized to bind it by their acts and representations. The principle, which gives rise to the estoppel, as well stated by the defendant's counsel, that it would be inequitable to permit a municipal corporation to take advantage of the falsity of solemn declarations of such agents within the scope of their authority. But if the officers making the recitals are not such agents, there is no room for the doctrine of estoppel. Their recitals, on no conceivable principle, can in such cases bind the corporation.

It follows that if any action can be maintained upon the coupons against any defendant, the validity of the proceedings, upon which the bonds were issued, must be established by affirmative proof of the sufficiency of the petition, which was the essential initiative to them. But the question is not before us, whether an action can be maintained against any other party; it is enough that we are of opinion that the present action cannot be maintained against the city and county of San Francisco. The plaintiff asks for judgment that the coupons are valid obligations of the city and county; that there is due, by the city and county, upon each of the coupons, thirty dollars, with interest; that the city and county pay the amount thus adjudged due, out of the special tax to be levied under the act, and that the plaintiff recover his costs of the action. Such judgment could not be rendered upon the facts stated in the complaint. The statute to which the complaint refers, and upon which, alone, the judgment is sought, declares, in express terms, "that the city and county shall not, in any event whatever, be liable for the payment of the bonds nor any part thereof," and "that any person purchasing said bonds, or otherwise becoming the owner of any bond or bonds, accepts the same on that express stipulation and understanding."

As already stated, the so-called bonds, which, in fact, are only orders or promises of the board of public works that the treasurer will pay to the holder the amounts designated, cannot be the foundation of any liability of the city and county; and that such liability is sought to be charged, appears from the prayer for judgment, although the discharge of that liability is to be had out of funds to be raised by the special tax for which the act provided.

The asserted ground of the action is, that it is essential to establish the validity of the bonds, as a preliminary to an application for a mandamus to levy the special tax. Counsel assume that the validity of the bonds issued by one party can be determined in an action against another in no way named in them, nor liable for their payment. We do not so understand the law. We have not met with any adjudged case to that purport. On the contrary, we have

always supposed that the party actually liable on a bond, must have his day in court, in person, or by his representative, before a judgment determining its validity as against him or his estate, could be regarded as having any binding force. Such liability cannot be vicariously imputed to him, or charged upon his estate. If the action be to charge particular property, of which there is no representative, there is a defect in the law which the legislature, and not the courts, must supply.

It is true that in the enforcement of bonds of municipal bodies, which are to be paid from funds raised by taxation, general or special, the validity of the bonds must first be established by the judgment of the court, that is, the demand against the municipality on the bonds must be first carried into judgment; then a mandamus will issue, which is in the nature of an execution. It is the executory process for the enforcement of the judgment recovered. It can only issue to command the corporation against which the judgment is rendered, or its representatives or officers, to levy the tax prayed, just as an execution on an ordinary money judgment can only be issued against the property of the judgment debtor. Whether, when the judgment against the municipality is rendered, the writ is to direct a general or a special tax upon all or a portion of the property within its limits or only upon a particular class of property, real or personal, will depend upon the directions of the statute providing for the payment of the indebtedness created. The judgment, however, must, in all cases, be against the corporation to which, or to whose representatives or officers, the writ is directed. It is the liability of the corporation established by the judgment which is to be discharged by the levy of the tax prayed, and not the liability of any other body.

The several cases cited by counsel in support of their contention in no respect militate against these views, but, on the contrary, illustrate and confirm them. In all of them the bonds were issued in the name, or were in law the obligations, of the municipality against which the judgment was prayed, though in some of them the funds for the payment of the judgment were to be collected by a special tax upon the property of a particular district. It would serve no useful purpose to comment at length upon the cases in verification of this statement. Every one who may take an interest in the subject will find, upon examination of them, its correctness sustained.

One of the counsel of the plaintiff indulges in his brief in some strictures upon the action of the city and county of San Francisco, with respect to these bonds, characterizing it as "dishonest and dishonorable repudiation." The accusation falls harmless in the face of the statute under which the bonds were issued, declaring that the city and county "*shall not, in any event whatever, be liable for the payment of the bonds, nor any part thereof*," and "that any person purchasing said bonds or otherwise becoming the owner of any bond or bonds accepts the same upon *this express stipulation and understanding*." Nor can the legislators of the city and county be sub-

jected to any just imputations of a want of regard to the honor and credit of the municipality in refusing to order the levy of a tax to pay the interest on the bonds, so long as the judgment of the highest tribunal of the state, the constitutional expounder of its laws, remains unreversed, declaring that the proceeedings on which the bonds were issued, were taken in disregard of the conditions imposed by the legislature, and, therefore, were absolutely null and void. If property of citizens has been taken and is retained for an avenue of the city without compensation, upon proceedings not warranted by law, some other remedy must be sought by the parties injured than such as consists in affirming the validity of those proceedings in face of the judgment of that tribunal.

It follows from the views expressed that no recovery can be had upon the facts disclosed in the complaint; and the motion of the defendant to exclude all evidence in support of its allegations, must be granted; and it is so ordered.

SAWYER, CIRCUIT JUDGE, CONCURRING. This case having been regularly called for trial, the plaintiff offered in evidence the bonds and coupons set out in the complaint, to the introduction of which the defendant objected, on the ground that the complaint does not state a case sufficient to justify the introduction of any evidence whatever; or, in other words, that the facts stated in the complaint do not make a case which entitles the complainant to any judgment or relief against the defendant, or upon which the defendant is in any respect liable to be sued. The counsel of both parties treated the objection as, in effect, a demurrer to the complaint, on the ground that the facts set out, taken as true, do not constitute a cause of action, and they argued the question very elaborately on that hypothesis.

The first question that meets us at the threshold of the discussion, is, whether the defendant—the municipal corporation, the city and county of San Francisco—is, in any sense, the obligor on the bonds, or whatever the instruments in suit may be properly termed; or whether it is in any way a party to the transaction out of which these instruments arose, in such sense as to cast any liability or duty upon the municipality in its corporate capacity.

In my judgment, the instruments sued on are not bonds of the city and county of San Francisco, and the city and county of San Francisco, in its corporate capacity, does not stand in any such relation to these obligations, as renders the corporation liable to be sued upon them for any purpose.

The act, under which the instruments sued on, purport to have been issued, is not an amendment to the city charter, and it does not purport to enlarge the powers or duties of the corporation, or of its officers, in their capacity of officers or agents of the corporation. It does not confer any authority whatever upon the corporation to do any act, in its corporate capacity, or impose any duty or obligation upon the municipality relating to the opening and dedica-

tion to public use of Montgomery avenue. The corporation is not authorized to do the acts necessary to the opening and dedication of the street to the public use contemplated by the act, or required to see that the costs of the work upon completion, shall be collected or paid; in short, the corporation, as such, is neither required nor authorized to perform any act in relation to the opening and dedication of the avenue, or in relation to payment therefor, when accomplished. Clearly, it seems to me, the state has undertaken to do this work through the instrumentalities chosen by itself, of which instrumentalities the corporation called the city and county of San Francisco is not one. Some of the officers of the city, it is true, are designated as instrumentalities for carrying out the scheme provided for, but in carrying it out they do not act by virtue of any authority derived under the charter of the corporation, or any act amendatory of the charter, or enlarging its powers, or under the authority of the corporation, but they act solely by authority of the act in question, independently of any act of the corporation, their designation by their official titles, being only *descriptio personarum* to indicate the particular parties chosen for the work.

The act describes a specific tract of territory, within the city and county of San Francisco, by metes and bounds, and then declares that "it is hereby taken and dedicated for an open and public street, and, *when paid for as hereinafter provided*, the title thereto shall vest in the said city and county for such purposes forever, as the title of other public streets, in said city and county, now is vested." This, with a provision for subsequent improvement and care, is the only one in the whole act, in which the city and county, in its corporate capacity, is brought into any relations with the improvement contemplated; and this relation only commences after the work of dedication and opening is fully completed, *and paid for*, by the agencies and in the manner appointed by the act. The expenses of dedication to public use, and opening the avenue, are to be paid for by assessments on a district of land, specifically described and designated by the act as benefited by the improvement. The board of public works provided for is not a board of public works *of the city and county of San Francisco*, with powers derived under the charter of the city, or any act enlarging those powers, or acting by authority of the corporation or its charter. It is not one of the branches of the municipal government.

This board is a special board of public works created by the statute, without any reference to the powers and duties of the corporation, to carry out this particular improvement undertaken by the state, without reference to or any action of the corporation, and without consulting its pleasure. It is, it is true, composed of three persons, who are also officers of the corporation and their official name is used to designate the individuals who are to constitute the board. But their individual names might just as well have been used, or any other three persons having no connection with the corporate government, might have been appointed to perform precisely

the same acts; and had this been done, there would be just as good ground for considering them agents of the corporation, and not instrumentalities employed by the state itself to carry out its purposes, as there is, now, to consider the board as an agent of the municipality, and not an instrumentality of the state. Doubtless, the legislature might have enlarged the powers of the corporation, or conferred the authority, or imposed the duty, upon it, to perform the contemplated work, but it did not see fit to do so. "The mayor, tax collector and city and county surveyor," of the city and county of San Francisco—that is to say, the persons who for the time being fill those offices—are "created a board of public works, within the meaning and intent of this act, and as such board are hereby authorized, empowered and directed to perform all and singular the duties herein enjoined upon the board of public works as herein provided." A salary of two thousand dollars per annum is allowed to each for his services in such board, payable out of the "Montgomery avenue fund," to be assessed upon the property benefited, as a part of the expenses of the opening of the avenue. Section 25 provides that, "the board of public works shall provide itself with an *official seal*, which shall be used to verify such acts of the board as are herein described to be done, under the seal of the board;" thus, apparently making it an independent corporation, or *quasi* corporation, for the purposes of the act.

Section 8 requires the board, at the proper stage of proceedings, to prepare and issue bonds for an amount in the aggregate "necessary to pay and discharge all said damages, costs and expenses," "said bonds shall be known and designated as 'Montgomery avenue bonds,' and the bonds shall be signed by all the members 'of the board,' and the seal thereof shall be affixed to each bond." There is nothing to authorize the issue of bonds by or in the name of the municipal corporation. They are to be issued by the board specially created for the purpose, under its own seal, provided for by the act, and not under the seal of the municipal corporation and not signed by the mayor as mayor or agent of the city. Under section 11, a fund sufficient for the purpose for payment of coupons and redemption of the bonds is to be levied, assessed and collected "in the same manner as other taxes in said city and county are levied, assessed and collected upon lands within the district supposed and determined by the act itself, to be benefited. Thus, the same machinery and instrumentalities used for collecting *other state*, as well as city, taxes, are adopted for assessing and collecting the special tax provided for the purposes of the act. The moneys so collected are to be paid, not into the *treasury* of the city and county as a part of its corporate funds, but to the *treasurer* of the city and county personally designated for the purpose, and is "to constitute the Montgomery avenue fund," "to be paid out by said *treasurer only* in payment of the coupons attached to said bonds," * * * and "in redeeming the bonds issued in pursuance of the provisions of this act."

The fund thus provided is set apart for this specific purpose, having no connection with the funds of the municipality, under the sole charge and management of the board of public works, and the person who happens, for the time being, to be treasurer. The municipal corporation, as such, has no power or authority over it—nothing whatever to do with it. Nor has the board of supervisors, the legislative and governing body of the corporation. It is under the exclusive authority and control of the agents of the state, especially designated by the act, to carry out the will and purpose of the state, as manifested by the act.

As if not enough to declare its purpose to make the improvement, to designate its own instrumentalities, and point out the mode of executing its will, leaving nothing to be done on the part of the corporation, or of its legislative and governing body, and to carefully avoid bringing the corporation or its legislative body into any relations whatever with the work; and as if to cut off all possibility of doubt upon the subject, it was expressly provided in the last section, but one, of the act, "that the city and county of San Francisco *shall not in any event whatever, be liable for the payment of the bonds, nor any part thereof, provided to be issued under this act;* and *any person* purchasing said bonds, or otherwise becoming the owner of any bond or bonds, *accepts the same upon that express stipulation and understanding.*" Thus the statute in no provision, authorizes the city and county of San Francisco, in its corporate capacity, or by the board of supervisors, its legislative and controlling body, or otherwise, to do anything in the matter of opening and dedicating to public use, Montgomery avenue, or to meddle with the funds provided for the purpose, or to assume any obligation or responsibility in the matter. The act imposes no obligation or duty upon the corporation or upon its controlling body nor does it even confer any power to act, in any manner, in regard to the work of opening Montgomery avenue, while, on the contrary, it expressly provides that it "*shall not, in any event whatever, be liable for the payment of the bonds, nor any part thereof, provided to be issued under this act.*"

The act does not authorize the issue of any bonds of the corporation, and the board of public works must have so understood the statute, for it did not, in fact, issue any such bonds. The instruments, set out in the complaint, neither in substance, in form nor in law, can be regarded as bonds of the city and county of San Francisco. They do not purport, upon their face, to be such, and there was no authority in the board to make them such. The only provisions in the whole act which bring the municipal corporation, in its corporate capacity, into any relations with the opening of the avenue, are the provisions in sections 1 and 16, relating to its disposition, after the work is both done and paid for, as provided in the act—after the will of the state has been carried out, and the purpose of the act fully accomplished. The provision of section 1, is, that the land described, "taken and dedicated for an open public street," "*when paid for, as hereinafter provided,* the title hereto shall vest in

said city and county for such purposes forever, as the title of other public streets in said city and county, is vested." Thus, after opening and dedicating the avenue to public use, and *paying for it*, in the manner provided, which was the task assumed to be performed by the state, the street is donated to the city; and until all this is fully accomplished, the city, in its corporate capacity, has nothing at all to do with the matter. And then, as a consideration for opening and dedicating the land for the avenue, procuring and vesting the title in the city and county, section 16 imposes an obligation on the corporation to thereafter sewer, grade, sidewalk, plank or pave the avenue, as in the case of other streets already dedicated to public use. The provision is, "The said Montgomery avenue, *when opened*, shall be sewered, graded, sidewalked and planked and paved by the municipal authorities in accordance with the rules, regulations, statutes and ordinances applicable to the other public streets of the city and county of San Francisco."

Thus the state assumes the duty, and work of dedicating and opening Montgomery avenue, and providing for payment by a fund assessed upon the property determined by itself to be specially benefited by the improvement, and, when its task is fully accomplished, turns the avenue over to the municipal corporation, to be thereafter improved under its direction and authority in the same manner as other public streets are improved, in pursuance of the powers conferred on it by its charter. And, until the avenue was thus opened, and turned over to the municipality, the city and county, through its legislative controlling body, or otherwise, had no corporate control over, or relation to, the matter, and had nothing to do with it.

These bonds were issued in connection with that portion of the work assumed by, and carried on, exclusively by the state, and under its direction, and with which the corporation had no concern.

The board of public works, and other parties designated by the Montgomery avenue act, to perform the duties therein indicated, performed such duties, solely by authority of that act. The duties were not performed by virtue of any authority of the municipal charter, or of any other act conferring power or authority upon the municipal corporation. The consent of the corporation was in no way obtained or asked. The acts were solely performed in pursuance of the express direct command of the statute itself, wholly irrespective of the will or the charter powers of the corporation. They were not performed in the exercise of corporate powers, and they were in no sense corporate acts. The authorities are numerous, establishing the proposition, that parties so acting by express direction of the statute, without the authority of the municipal corporation, and not acting by virtue of the powers conferred on the corporation by its charter, do not act as officers or agents of the corporation, and the corporation not being the principal, their acts are not the acts of the corporation; they are but the agencies employed by the directing power, for the accomplishment of its own purposes.

The following are some of the authorities establishing this self-evident proposition; and it will be sufficient to cite the cases without analyzing or commenting upon them in detail: Sheboygan County v. Parker, 3 Wall., 96; Horton v. Town of Thompson, 71 N. Y., 521; Board of Park Commissioners v. Detroit, 28 Mich., 244-5; People, etc., v. Chicago, 51 Ill., 17; Hoagloud v. Sacramento, 52 Cal., 149; Tone v. Mayor, 70 N. Y., 165; N. Y. and B. S. M. and L. Co. v. Brooklyn, 71 N. Y., 584. In Horton v. Town of Thompson, *supra*, the court said: "In the present case no action on the part of the town in its corporate capacity, or on the part of any of its officers, was required by the act, or was taken. The money was to be borrowed and the bonds issued by commissioners to be appointed in *the manner prescribed by the law. These commissioners were in no sense town officers, nor did they represent the town:*" p. 521.

The strongest case cited in opposition to the views expressed, and to support the position that the opening of Montgomery avenue, was a municipal, and not a state, undertaking, for which the municipal corporation is liable, is that of Sage v. City of Brooklyn, 89 N. Y., 189. But there were several clauses in the statute involved in that case, upon which the court relied, and rested its decision, that are wholly wanting in the Montgomery avenue case. "Thus," says the chief justice, who delivered the opinion of the *majority* of the court, "by the third section it is declared, that the lands '*shall be deemed* to have been *taken by the city of Brooklyn* for public use':" Id., 197. "That the improvement of Sackett street was regarded *by the legislature of the state, as a city*, and *not a state, improvement*, also *plainly appears* from the supplementary act, chapter 592, Laws of 1873. The park commissioners were, by that act, authorized and directed to improve Sackett street by grading, paving, planting shade-trees, constructing carriage-ways, etc., and *by the fourth section the city was required to issue its bonds* for the purpose of raising money to pay the expenses of the improvement, and the money collected on assessments was directed to be paid to the commissioners of the sinking fund, *for the redemption of the bonds:*" Id., 198. Thus, by the express terms of the statute, the land was "*deemed to be taken by the city,*" and the *city* was expressly made *primarily liable*, and *required to issue its own bonds*, and reimburse itself from assessments on the property benefited. There is nothing of this kind in the Montgomery avenue act, and nothing even looking in that direction. So, also, referring to section 16, of another act, as applicable, the chief justice says: "The direction of section 16, that the comptroller shall pay the land damages, is *absolute and unqualified. It is not a direction to pay them out of the assessments when collected, or out of any particular fund:*" Id., 199. Again: "The city, under that statute (supplemental act of 1873), was required, *primarily*, to *advance the necessary fund.* The provision in the act of 1873 furnishes a strong inference, in favor of the claim, that the legislature, by incorporating section 16 of the charter into the act of 1868, *intended*

to impose upon the city the duty, either primary or ultimate, of paying the landowners:" Id., 200. On these, and other similar provisions, the decision was rested. Yet, in the face of these strong provisions of the statutes, showing that the acts in question were intended to be municipal, and not state acts, and expressly imposing the liability on the city, those two able judges, of long service and ripe experience, Earl and Rapallo, dissented, in a clear and cogent opinion, and held the work to be a state, and not a municipal, work, for which the corporation was not liable. Said Mr. Justice Earl in the case: "The land was taken and appropriated by the direct act of the legislature, and, by the same act, the park commissioners were appointed to enter upon the land, and make the improvement. They were not agents of the city, but state agents. They were not officers of the city, and, in what they did, they did not represent the city, and had no authority in any way to bind it, and could in no way make it responsible for these awards. They had the precise authority conferred upon them by the act, and no other; and the liability of the city for their acts, or, for the land taken, or awards made, is not so much as hinted at by the act."

"For the position, that the park commissioners were not agents of the city, for whose acts the city could be made responsible, the cases of Maxmilian v. The Mayor, 62 N. Y., 160; Tone v. The Mayor, 70 Id., 157; and New York and Brooklyn Sawmill and Lumber Co. v. The City of Brooklyn, 71 Id., 580, are abundant authority. The general rule, as deduced from these cases, is that a municipality is not liable for the acts or omissions of an officer in respect to a duty specifically imposed upon him which is not connected with his duties, *as agent of the corporation*, and that such a corporation is only liable for the acts or omissions of officers in the performance of duties *imposed upon the principal:*" Id., 204.

But, conceding the case to be well decided, the court, in its decision, rested upon express provisions of the statute, making the city of Brooklyn responsible, and the case now in hand is entirely different. There is no such provision in the Montgomery avenue act. That act is, absolutely, barren of any such or similar provisions.

The other cases apparently most confidently relied on to show the liability of the city are Jordan v. Cass County, 3 Dill., 185, and Davenport v. County of Dodge, 105 U. S., 238. The bonds in the former case were issued by the county in the name of the county, by express direction of the statute. In the latter case the bonds were issued by the county commissioners, the governing body of the county, *in pursuance of an express provision of the statute*, for a precinct indebtedness. It was held by the supreme court, following the construction adopted by the supreme court of Nebraska, that the county was liable upon the bonds under the statute authorizing the issue of *county* bonds, for the precinct indebtedness, but it was held that the indebtedness was to be satisfied out of funds collected from the precinct. In Meath v. Phillips county, 108 U. S., 555, the supreme court, referring to this case and the case of Cass

county v. Johnson, said: "In the case of Cass county, the law provided in terms for an issue of bonds *in the name of the county*; and in that of the county of Davenport, we construed the *law to be, in effect, the same.* Consequently there were, in those cases, *obligations of counties*, payable out of special funds." These cases are, therefore, entirely different from the case under consideration. On the contrary, the case of Meath v. Phillips county just cited, is decisive in favor of the proposition maintained in this opinion—that where the state, or some other district or organization, employs certain officers, designated by their official names, of a city or county, in pursuance of the statute, as agents or instrumentalities for accomplishing their own proper purposes, such officers, in performing the acts thus required, do not act as officers or agents of such city or county, but as agents or instrumentalities of the state, or other district or organization for which the services required by the statutes are performed: 108 U. S., 554–5.

It is clear to my mind, both upon principle and authority, that the city and county of San Francisco, is not, in substance, or in form, *an* obligor on, or party, in any sense, to the bonds and coupons sued on; that under the Montgomery avenue act, it could not have been, legally, made an obligor on, or party to, the bonds issued in pursuance of the act; and that, in its corporate capacity, it has no relation to those bonds, and no duties to perform in connection therewith. The duties to be performed, whatever they may be, in connection with the bonds and coupons in suit, by parties who are also officers of the city and county of San Francisco are, in my judgment, to be performed by them under the provisions of the statute, as agencies or instrumentalities of the state, and not as agents or officers of the city. It follows, necessarily, that the city and county of San Francisco in its corporate character, is, in no respect, chargeable with any liability, of any kind, upon the instruments sued on.

There being no liability of any kind, and no duty to perform by the municipality in its corporate capacity, in relation to said instruments, no action, or judgment, can be rendered in the case that could avail anything as a foundation for proceeding by mandamus to compel the assessment and collection of a fund, for the payment of the coupons, and ultimate redemption of the obligations in question. For that, or any other purpose, looking to the collection of the money claimed to be due, the action might, just as properly, be brought against the city of Oakland as against the city and county of San Francisco.

The property holders of the district liable to be assessed, under the Montgomery avenue act, with respect to their lands, and the indebtedness in question, do not, under the act, stand, in any respect, in privity with the corporation—the city and county of San Francisco—and in relation to the instruments in suit, the municipality does not represent either the owners or the lands. Any judgment against the city, in this action, could not bind or conclude the owners or their

property, neither being, in any sense, parties, or privies to parties, to the suit. The judgment, under such circumstances, could not afford any valid or legal foundation for proceedings by mandamus against the parties charged with the duty of assessing and collecting the Montgomery avenue bond tax; for, in that capacity, they are not officers, agents, or instrumentalities of the municipal corporation; and they are not in privity with it. A mandamus, in the national courts, is in the nature of process, to execute a valid judgment; and it must be against the judgment debtor, or obligor, or some one representing the judgment debtor, or obligor. A proceeding, by mandamus, against the parties charged with assessing and collecting the tax in question, based upon a judgment in this case, would be very much like proceeding by an execution against B, to satisfy a judgment against A, between whom there is no legal relation whatever, affected by, or affecting, the judgment.

If the views expressed are sound, the complaint presents no cause of action against defendant, and the facts alleged, and offered to be proved, are wholly immaterial.

It would be but a waste of time, to occupy the attention of the court, in taking testimony, which cannot prove, or tend to prove, any valid cause of action. The complaint is wholly insufficient, and the pleadings present no material issue. For the reasons stated in this opinion, and in the opinion of the presiding justice, in which I concur, the objection to the introduction of the evidence offered, must be sustained.

IN RE SUN HUNG AND SI YEE.

August 24, 1885.

APPEALS—HABEAS CORPUS.—Under section 764 R. S., amended by the act of March 3, 1885, (Session Laws, 1885, 437) the right of appeal in *habeas corpus* cases is absolute, and not dependent upon the discretion of the judge, to allow or deny an appeal.

CHINESE RESTRICTION ACT.—Policy of allowing appeals on questions of fact, arising under the Chinese restriction act discussed, and limitations on the right of appeal suggested.

J. C. B. Hebbard, for the petitioner.

SAWYER, CIRCUIT JUDGE. THIS is an application for the allowance of an appeal to the supreme court, under the recent act of congress giving an appeal in those cases. The case was brought to this court by appeal from the district court, and the appeal is on a question of fact, whether these two parties were born in the United States. The testimony is extremely slender, and uncorroborated, and the judgment in the district court, was, therefore, affirmed.

The act is very general and comprehensive in its provisions, and I was in doubt, whether or not the right of appeal is absolute, or whether I have any discretion to refuse to allow the appeal. Had I the discretion, I, certainly, should deny an appeal in this case. I think it is a case with which the supreme court should not be troubled. I

do not think there is enough in it to justify taking it up. There is no question of law involved. If there is no discretion in these cases, every case of *habeas corpus* of this character, whichever way decided, can go to the supreme court on appeal. Upon examination, I have come to the conclusion, that I have no discretion in the matter, and that, the right of appeal is absolute. I think the act must have passed without due consideration, without appreciating the effect or the consequences of an unlimited right of appeal. There should, in my opinion, be an appeal in some cases. A petitioner ought not always to be compelled to wait until the judges disagree. Very important questions arise under the Chinese restriction acts, which the judges themselves are not clear upon, in which there ought to be a decision of the supreme court of the United States, and in which the judges earnestly desire such a decision. These acts involve international considerations and international questions of the highest importance, but in my judgment, there should be some limit to the right of appeal in these matters. Perhaps the right ought not to rest upon the discretion of the judges who have tried the cases, because, it would be a delicate matter for them in some cases to deny an appeal from their own judgments. Certainly, in addition to the case of an appeal, where there is an opposition of opinion in this class of cases, wherever a judge finds a question of law upon which he is not clear, he alone, in my judgment, should be entitled to certify that question up, for final decision of the supreme court, where the matters are of so much importance as are often involved in the construction of the Chinese restriction acts. There have been several questions raised before and decided by me, which I should have been very glad to certify up, and should have certified up for an authoritative decision of that tribunal, had I been authorized to do so.

I think there should be no appeal on a mere question of fact, unless there is additional testimony to be taken before the supreme court. In this class of cases the judge who hears the evidence, and sees the witnesses, is, certainly, in a much better situation to determine a question of fact than the supreme court could be on the written record of what occurs before the court of original jurisdiction. On the question of fact, it seems to me, there ought not to be an appeal. However, congress may think otherwise. I merely make the suggestion on the question of policy. On an important question of law affecting the rights and liberty of parties under the constitution and laws of the United States on which any judge entertains a reasonable doubt, and thinks should be determined by the supreme court, there, certainly, should be an appeal. Where the judge has decided the case, and feels confident of the correctness of his decision, there should be some such limitation as this: The party appealing should be required to present a copy of the record to one of the justices of the supreme court, for his examination, to see whether the appeal is frivolous, or whether there is really anything in it, that justifies the allowance of an appeal; and

such justice should have some discretion in the matter of allowing an appeal.

There, certainly, could be no objection to entrusting that discretion to a justice of the supreme court, whatever objection there might be to entrusting such power to the court that heard the case. Such a rule is prescribed by the recent act authorizing writs of error in certain criminal cases to remove them from the district court to the circuit court. In such a case, the party who desires the writ of error is compelled to prepare a copy of the record, and lay it before the circuit judge of the court to which the case is to be taken, for review, and if he deems it to present a question of sufficient doubt to justify a hearing in the appellate court, he is authorized to allow a writ of error. I have had occasion to pass upon several cases of the kind, and to deny the writ in some, as frivolous. If the judge thinks the application frivolous, and there is no point worthy of consideration, he is authorized to deny the writ. I see no reason why a similar provision should not be made applicable, at least to the justice of the supreme court, so that when the circuit court has decided for or against a petitioner on *habeas corpus*, the party feeling aggrieved should take the record to a justice of the supreme court, and allow him to determine whether the appeal is frivolous, or whether there is some real question that is worthy of consideration, and give him discretion to allow or deny the appeal, as he deems the justice of the case requires. Such a provision, with the limitation that there should be no appeal on questions of fact, would, perhaps, afford the proper remedy.

Viewing this question as I do, and believing the right of appeal to be absolute, and that I have no discretion in the matter, I allow the appeal, and shall fix the bail bond at $2,000, with a bond of $300 to cover costs.

In the case of Ty Moy on appeal, which is an application of a similar character, the appeal will be allowed, and the same bonds fixed.

On the day following the allowance of the appeal, the attorneys of the parties being present, the circuit judge made the following additional observations:

I desire to add some observations, to what I said on yesterday in this case.

In allowing the appeal, the opinion was expressed that there ought to be no appeal on a question of fact. It has since occurred to me, that, in view of the object and policy of the law, perhaps, it might be held, without a very greatly overstrained construction, of the statute, that the appeal only lies upon questions of law. Undoubtedly, the principal object of the statute, is, to procure an authoritative construction of the constitution, law, or treaty under which the question arises; and, if I could see my way clear, I should limit appeals to cases presenting questions of law, only. But, as, was stated yesterday, the language of the statute is very broad and comprehensive. Combining the two provisions of the statute into

one, it reads: "From a final decision of such circuit court, an appeal may be taken to the supreme court," "in the *case of any person, alleged to be restrained of his liberty*, in violation of the constitution, or of any law or treaty of the United States." This is "a case" in which such restraint is alleged; and the statute does not, in terms, nor by plain inference, limit the appeal to the *legal* points involved in "the case."

The law points in this case, had they been reached, under the settled decisions, so far as the courts of this circuit can settle them, would have been decided in favor of petitioners. It was held in Look Tin Sing's case, 4 West Coast Rep., 364, and 21 Fed. Rep., 905, Mr. Justice Field delivering the opinion and three other judges concurring, that a child born in the United States, of Mongolian parents, residing at the time in the country, is a citizen, and entitled to enter the United States as such, irrespective of the restriction act. But this case was determined apon a mere question of fact, whether the petitioners were born in the United States. This question on the construction of the statute as to a right of appeal on a mere question of fact, was not suggested, nor did it occur to me under the broad language of the statute, before allowing the appeal. It may be, that the supreme court may feel justified in limiting the appeal to questions of law. I suggest the point without expressing a decided opinion, as to how it should be, ultimately, decided, but for the purposes of this case, rule against it. It is a point, a least, that the government, which has intervened, is entitled to have considered, and determined by the supreme court; and the public interests requires, that it should be so determined. Should the appeal be thus limited, it would obviate, to a great extent, if not, wholly, the great inconvenience now apprehended from the act.

The allowing of this appeal will enable the supreme court to, authoritatively, determine the point, at an early day, as the attorney general, at the opening of the next term of court, in October, can move to dismiss the appeal, on the ground, that an appeal does not lie under the act, upon a mere question of fact, the law applicable to the facts, assuming the petitioners to have been born in the United States, having been already settled in their favor.

I suggest this course, and on an intimation from the United States attorney, that this suggestion will be promptly, acted upon, I shall suspend final action on any other application for an appeal, on questions of fact, till an opportunity is had to obtain a decision of the supreme court, on the point suggested.

It is expected, however, that prompt action will be taken.

SUPREME COURT OF ARIZONA.

ARIZONA PRINCE COPPER COMPANY *v.* COPPER QUEEN MINING COMPANY.

Filed. 1885.

VERDICT—APPEAL—CONFLICT OF EVIDENCE.—A judgment, based upon a verdict, where there is a substantial conflict in the evidence, will not be disturbed by the appellate court.

MISCONDUCT OF JURY—DRINKING INTOXICATING LIQUORS.—The fact that, pending their deliberations, the jury drank intoxicating liquors, at the joint expense of the parties to the litigation, will not vitiate the verdict, unless it appears that some of the jurors became so intoxicated as to be disqualified for the proper discharge of his duty.

APPEAL from a judgment of the first judicial district court of Cochise county. The opinion states the facts.

Lewis & Dibble and *W. H. Stilwell*, for the appellant.

George R. Williams, for the respondent.

HOWARD, C. J. Action of ejectment for the recovery of mining ground; judgment in the district court of Cochise county for plaintiff. Motion by defendant for a new trial denied, from which judgment and order denying motion defendant appeals to this court. By stipulation, appearing in the record, the questions of location, corporate existence and claim for damages for value of ore extracted, made by plaintiff's complaint and the cross-complaint of defendant, are eliminated from the case, leaving for review on appeal the legal right of the parties to the body of ore involved in the issue and the question presented by the appellant's specification of errors—alleged misconduct of the jury.

Plaintiff, the Arizona Copper Prince Company, and defendant, the Copper Queen Mining Company, own adjoining claims with a common side line, of between five hundred and five hundred and sixty feet. By the allegations of the complaint, and the evidence of plaintiff, the claim, as asserted and sought to be established, that the apex, or outcrop of the vein, is on the ground of plaintiff, and that it has the right to follow it beyond and under the side line into the adjoining ground of defendant.

The defendant, by cross-complaint, admits a portion of the outcroppings to be on plaintiff's ground, and alleges, and gives evidence tending to establish the fact alleged, that part of the outcroppings is on its ground; that the vein at the surface divided, and that one division extends into defendant's ground, the other running into plaintiff's ground.

Plaintiff admits that a streak of the ore bearing rock comes to the surface of defendant's ground, but contends that it is outside of the walls of the vein, and is but a spur of the main vein which outcrops on plaintiff's ground.

The plaintiff claims that both walls of the vein are on its ground, and defendant practically concedes that the foot wall is on plaintiff's ground, but denies that the hanging wall is.

The issue made by the pleadings, is to the character of the body of ore, whether a lead, lode or vein, and other questions of fact, notably the particular location of the apex of the vein, with reference to the boundaries of the respective claims, the dip and course of the vein, etc., as well. The questions in controversy above referred to, were all questions of fact, no more positively asserted and insisted upon on the one side, than denied and controverted by the other, not only by the pleadings, but by the evidence in the case. There is not a material fact involved in the issue joined between the parties, which was not on the trial controverted, and that, by evidence not only conflicting in its character, but, in our opinion, bringing the case clearly within the rule of "substantial conflict" in the evidence. The immense volume constituting the record in this case, contains over six hundred pages of evidence, and we have examined it with a view to ascertain if there was one material fact in controversy in the issue upon which there was not sufficient evidence on either side to clearly warrant the application of the rule of noninterference of the appellate court, where there is a substantial conflict in the evidence.

If we were to accept the rule insisted upon by appellant, that "if the great preponderance of evidence is against the findings or verdict, the court should reverse it" (which we do not accept as a correct rule of action for the appellate court) we fail to find in the mass of testimony *pro* and *con* on each of the contested propositions involved in this case, that "great preponderance" which would bring our action within such a rule.

Even that rule would not warrant our interference with this judgment. The issues were plainly and squarely presented by the pleadings at the trial and the too frequent conflict of "expert testimony" is not more apparent than the conflicting testimony of nonprofessionals on the material facts involved. The case is clearly within the well established rule that a judgment based upon a verdict where there is a substantial conflict in the evidence should not be disturbed by the appellate court: U. P. Ry. Co. v. Diehl, S. C. Kansas, 6 Pac. Rep., 566; 53 Barb., 21; 5 Nev., 415; 12 Cal., 48, 452; 24 Id., 348; 47 Id., 267; 18 Fla., 609; 40 Mich., 512; 33 Id., 49.

The alleged misconduct of the jury appears by the record to have been carefully and thoroughly investigated by the court below on the motion for a new trial.

We concur in the conclusions arrived at by that court. While it is true that the jury "were feasted and wined" at the dinner ordered by the sheriff, by the agreement of both plaintiff and defendant, a proceedings which the officer in charge of the jury ought not to have permitted, even by consent of both parties, we are yet unable, after reading the many affidavits bearing upon the question of the alleged intoxication of members of the jury, to come to the conclusion that any of them indulged in liquors to the extent of intoxication, or that by reason of the eating and drinking by the jury at the joint expense of the parties, the jury or any member thereof

was unfitted for the intelligent, fair and impartial performance of duty.

That intoxication would disqualify a juror from the performance of his duty and amount to misconduct, there can be no question, and while it is true that there is some evidence from which the fact of the use of liquor by the jury, other than that drank at the supper table, may be legitimately inferred, much of the showing to impeach the verdict, was speculative and of a character not commending itself to our confidence. We cannot find from the evidence that any juror was intoxicated or under the influence of liquor.

The plaintiff and defendant prepared the feast and inaugurated the festivities. Neither can be heard to complain of the act and performance which they jointly inaugurated without proof of intoxication to the extent of disqualifying the jury or some member thereof for a proper discharge of duty.

The rule is well established that courts will not disturb a verdict when satisfied that intoxicating liquor had no influence upon the jury, and we are satisfied on that point in this case: 6 Col., 452; 7 Nev., 408; 1 Id., 406; 28 Ark., 165; 33 Am. Rep., 506; 3 Murphy, 487; 32 Ohio St., 333; People v. Lyle, 4 West Coast Rep., 349; May v. People, 6 Id., 568.

The charge of the court, including the instructions asked and given, taken as a whole, gave the law fairly and correctly to the jury.

We find no valid grounds for a reversal. The judgment and order of the court below denying the motion for a new trial are affirmed.

FITZGERALD, A. J., concurred.

PINNEY, J., having tried this case in the court below, took no part in the decision.

SUPREME COURT OF UTAH.

TERRY *v.* STREET.

Filed August 4, 1885.

UNITED STATES PATENT—WHEN CAN BE COLLATERALLY ATTACKED.—If, under any assumed state of circumstances, a United States land patent can be valid, it cannot be attacked in a collateral proceeding, or in any manner, except by direct action to set it aside, either by the United States, or by the person who has succeeded to its right.

THE SAME—VALENTINE SCRIP—VALIDITY OF PATENT UNDER.—A United States patent to land, entered under the so-called Valentine scrip, is not void, so as to be open to collateral attack, either by reason of the fact that the land was found, after survey, to be included within a sixteenth section, or was mineral in its character, or, at the time of the application of the scrip, was occupied by squatters.

APPEAL from the district court. The opinion states the facts.

P. Denny, for the appellant.

Sutherland & McBride, and *Arthur Brown*, for the respondent.

EMERSON, J. The form of this action is one for the possession of real estate, situated in the town of Park City. The plaintiff claims title under the patent of the United States, and by mesne conveyances to the plaintiff from the patentee. No question is made as to the existence of the patent, or the title deraigned therefrom in plaintiff; but in this action at law, for the recovery of possession, the defendant seeks to assail that patent, on the following grounds:

First. The premises, in truth, did describe a part of section 16, and that, therefore, they were not open to settlement, and the plaintiff and his grantor had no right to patent the same, for the reason that it was a school section, and the authorities were forbidden to patent the same to settlers.

Second. That the said lands were mineral lands, and, therefore, not open to claims of settlers.

Third. That the lands were occupied by people squatted thereon, and claiming to be a city, to wit: Park City.

We will determine these three objections in their order. The plaintiff procures his title under the scrip known as Valentine scrip. The authority for the issuing of which is to be found under the general laws of the United States of 1881, page —, which authorizes the holders of such scrip to enter unappropriated lands of the United States, and the first question involves the inquiry as to what is the meaning of appropriate or unappropriate. It is complained by the appellant that lands which may possibly fall in section 16 or 36, although not then surveyed, are appropriated. On the other hand, it is contended that the only appropriation of the lands which fall within section 36 and 16, is when they are surveyed and found to be such sections by official survey; and until such survey, the lands are open for any appropriator and a person seeking to pre-empt or to homestead on such lands has always to be recognized as one entitled to enter thereon, and his right has to be protected, although afterward the number of this section turned out

to be 16 or 36. The Valentine scrip was not more limited. The holder of it had the right to enter upon any lands which had not been actually designated and set aside for the use of schools or for the use of actual appropriators. These pre-emptors or people were not holding under homestead claims. These lands had never been pre-empted or made subject to homestead claims, nor had they been surveyed at the time when this patent was applied for. If under any assumed state of circumstances a patent can be valid, then it cannot be attacked in any collateral proceeding or in any manner except by direct action to set aside the deed indicated either by the United States or the persons who have succeeded to its right. It is apparent that this patent not only could have been, but under the existing circumstances, was valid. It was not in the power of the defendant or appellant to attack that patent in a court of law on the ground that it included school lands. The law upon this subject is fully stated in the case of Steel v. Smelting Co., 106 U. S., 454. "So with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the government, to which the alienation of the public lands is confided, the remedy of the aggrieved party must be sought by him in a court of equity if he possesses such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation. It cannot be vacated or limited in proceedings when it comes collaterally in question; it cannot be vacated or limited by the officers themselves.

Their power over the land is ended when the patent is issued and placed on the records of the department. The other cases cited on both sides are in conformity with this ruling. The determination of this first question decides the other also. If these premises were mineral lands as claimed by the appellant and the appellant had any right therein, it was his duty to have applied for a patent and assert his right before the department. An adjudication of the department of the land office upon the subject is conclusive and final. It would be a strange doctrine, if after the United States government has patented land away and minerals should be discovered in the lands, within his patent or deed, that some outside discoverer could say the patent was void. Such was not the intention of the law. If it had been true that any mineral entries had been made at the land office at the time this patent was applied for, then such owners and the defendant among them, if he were one, must have had notice of the procedure, and the law assumes and presumes he did have notice. If after inquiry the land office determined the plaintiff had or his grantors had a right to a patent that decision was binding upon the court. The same result must follow if no inquiry was entered into. The land office had jurisdiction in the matter; its determination was final.

Precisely the some views control the third point. The defendant offers to prove that there were, at the time of the application of this Valentine scrip to the premises in question, a few hundred squatters within the land conveyed. Those squatters had taken no measures or steps to procure title under the town site law, filed no papers in any tribunal entitling them to act as such. If it was desired and within the law to plat a town site entry they had ample opportunity. Until they did so they were trespassers, and the lands were unappropriated and it was open for the government to eject them: Yosemite case, 15 Wall., 77. Until such act on the part of squatters, any person having the authority of the United States government could deed the same. The grantor of the plaintiff holding the Valentine scrip had the authority of the United States government. These lands at the time had been unappropriated in every sense of the term. They had not been even surveyed and until they were surveyed no appropriation whatsoever had been made of them. The court concurs in the findings and the opinion of the court below.

The other judges concurred.

SMITH *v.* IRELAND.

Filed August 7, 1885.

GENERAL AND SPECIAL VERDICT—POWER OF COURT TO DIRECT.—Under section 1,400 of the compiled laws of 1876, the trial court has discretion to direct a general or special verdict, or special as to the controverted facts and general as to those not controverted on the trial.

FINDINGS SUSTAINED BY EVIDENCE.—The findings that the sale in question was made to hinder, delay and defraud the creditors of the vendor, held sustained by the evidence.

VERDICT—PREPONDERANCE OF EVIDENCE.—A verdict will not be set aside unless the court is satisfied it is against a clear preponderance of the evidence.

INCOMPETENT EVIDENCE—ADMISSION OF WHEN IMMATERIAL.—The admission of incompetent evidence will not warrant a reversal, if the court is satisfied, from the other evidence, that the jury did substantial justice between the parties.

APPEAL from a judgment of the first district court. The opinion states the facts.

Williams & Renick, for the appellant.

Kimball & Heywood, for the defendant.

ZANE, C. J. This is an action of claim and delivery, appealed from the first district court.

The defendant plead justification, as marshal, under an execution issued on a judgment against W. S. Hopson, and in favor of Idleman Bros., and that the property described in the complaint was owned by Hopson, and by him sold to plaintiff before the levy, to hinder and delay Idleman Bros. and other creditors in the collection of their debts. Under the instructions of the court the evidence was submitted to a jury with directions to find on the following questions: 1st. Was Hopson, at the time of sale, indebted to Idleman Bros.? 2d. Did Hopson sell to plaintiff, to delay, hinder or defraud

his creditors generally, in the collection of their debts, or the firm of Idleman Bros.? 3d. Did plaintiff, at the time of sale, have notice that Hopson was indebted to Idleman Bros., and that the sale was made to hinder and delay them in the collection of this debt? 4th. What was the value of the property taken by defendant? 5th. Is the defendant entitled to a return of the property described in the complaint?

To the fourth question the jury answered one thousand five hundred dollars; and to each of the others, simply "yes." When considered with respect to the question alone the second answer is quite indefinite; but, viewed with the other questions and answers, the intention of the jury is sufficiently clear. The plaintiff's counsel makes the point, that the fifth interrogatory submitted a question of law to the jury. Section 1,400 compiled laws of Utah, 1876, declares: "A general verdict is that by which they (the jury) pronounce generally upon all or any of the issues either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict shall present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact shall be so presented as that nothing shall remain to the court but to draw from them conclusions of law." This statute contemplates three classes of verdicts. 1st, general; 2nd, special; 3rd, general and special. A general verdict is a direct statement of a conclusion of law, and an indirect statement of the facts from which the conclusion is drawn; it expressly affirms the law and inferentially the facts. The jury are directed by the court to indicate the facts found from the evidence by the statement of a conclusion of law. If they believe certain facts, they are told to state a certain conclusion, and if they do not believe such facts to state another conclusion.

The court states the law applicable to the facts which the evidence tends to prove, and if the jury find the facts they state the conclusion as charged. In case of a general verdict, the court states the law applicable to the facts before they are found by the jury, and in a special verdict the jury find the facts first, and the court declares the law applicable to them afterwards. In either case, the jury judge of the facts and the court of the law. In the third class of verdicts, the jury state the conclusion of law applicable to the material facts as to which there is but little or no room for controversy, without mentioning them in their verdict, and specifically name the material facts mainly contested on the trial, without stating the conclusion of law applicable to them; the court reserves the right to make that statement after the finding of the jury.

There was no room for controversy as to the existence of the material facts of the case aside from those specifically found. The controverted facts essential to the conclusion of law, of which the fifth finding was a statement, were specifically stated in other findings. It was within the discretion of the court to direct a general or special verdict, or special as to the controverted facts and gen-

eral as to those not controverted on the trial. We find no error in the submission of questions to the jury, or in the refusal to submit others requested by the plaintiff. And the verdict embraces all the material issues, and is sufficiently specific.

The plaintiff insists that the findings of the jury are not sustained by the evidence. The alleged sale by Hopson to plaintiff was on March 21, 1883. The defendant insisted that it was made to hinder, delay and defraud the creditors of Hopson, and that plaintiff knew it. The plaintiff testified he was tending bar for Hopson on the day of the sale, and had been with him for several months; that he knew Idleman Bros.; that Lachs was their traveling agent, and that he was in the saloon the day before the sale, when Lachs was there; that he knew Hopson was in debt to Idleman Bros., and heard Hopson say he must get money to pay his debts. On same day, but after sale, heard Hopson say he had sold out to raise money to pay his debts. That bill of sale to witness was made about eleven o'clock A. M., March 21, 1883, and the preliminary invoice was made the preceding day. As shown by it, the cost of stock was $1,900. Mr. Lachs, traveling salesman of Idleman Bros., testified that the day before the sale he had conversation with Hopson in his saloon, and plaintiff was there, and could have heard it; that witness asked Hopson for money, and said to him he was collecting that trip, and must have the money; that Hopson said he would try to raise some. Witness supposed plaintiff heard the conversation; it occurred in the afternoon. The next morning, about nine o'clock, had another conversation with Hopson in his saloon, and Smith was there; that the debt was mentioned, and Hopson then said he would raise witness some money; was then paying some to Woolner. Witness went to the saloon again same forenoon, and Hopson paid him $100, and said he had sold out to Smith. Several other persons were there. The foregoing was the most important testimony for the defendant. It was contradicted in some important respects by the testimony for the plaintiff. The relations of Hopson and plaintiff, their associations and conduct, their business and financial necessities and conditions, with the circumstances which preceded, attended and followed the sale, as shown by the evidence, with the other evidence, when all considered together, afford inference that the sale to plaintiff was made to prevent and hinder the defendants in the collection of their debt. The contention before the jury was chiefly as to the good faith of the plaintiff in taking the bill of sale from Hopson. The evidence was conflicting, and the jury found the issues for the defendant. The authorities are to the effect that a court will not set aside a verdict unless satisfied it is against a clear preponderance of the evidence. In view of all the evidence, we are not satisfied the verdict is wrong.

O. Vandercook, the officer who levied the execution, was asked by defendant's counsel what Hopson said when witness demanded payment, and answered that Hopson said "he had no property to levy on—had money but would not pay, and that nobody could go

through his pockets." Objections to the question and answer were interposed by plaintiff and overruled by the court and exceptions taken. Defendant's counsel also asked witness M. Lachs what Hopson said to him on the same day but subsequent to the sale, and answered in substance as above. Objections to this question and answer were also made by plaintiff and overruled by the court, and exceptions were taken by plaintiff.

The admission of this evidence plaintiff assigns as error. Proof of a demand by the officer and the answer of Hopson that he had no property to levy on was competent, but the further answer that he "had money and nobody could go through his pockets," was incompetent, as was the answer of Lachs that Hopson said after the sale he "had money in his pocket but would not pay, and nobody could get it." Other evidence before the jury showed that Hopson had money after the sale and his refusal to pay more than the one hundred dollars paid, and twenty-five per cent of the remaining debt which was offered in satisfaction, but not accepted.

Without the objectionable testimony there was sufficient evidence to show that Hopson had money which he refused to pay on his debt to defendant. The testimony objected to did not tend to prove that plaintiff acted in bad faith, because it does not appear he knew of the statements of Hopson or assented to them. Bad faith on the part of plaintiff was the question about which there was the most room for controversy. The probabilities are, the jury would have reached the same conclusion without the incompetent testimony. In view of all the evidence, we incline to the opinion that the jury did substantial justice and that the errors complained of are not sufficient to reverse this case. We find no other error in this record. The judgment of the court below is affirmed.

EMERSON, J., and TWISS, J., concurred.

DARKE v. IRELAND.

Filed August 8, 1885.

JURISDICTION—ERRONEOUS EXERCISE OF—JUDGMENT.—When a court has obtained jurisdiction over the persons and over the subject matter, error in the exercise of that jurisdiction does not make the judgment void.

EXCESSIVE JUDGMENT NOT VOID.—A judgment is not void, if given for a greater amount than the party is entitled to, if the court has jurisdiction over the parties and the subject matter.

ADJOURNMENT OF TERM—EFFECT OF ON JURISDICTION.—After an adjournment of a term at which a judgment is rendered, the court loses all power to set it aside on motion made at a subsequent term, in the absence of a statute authorizing it to be done. Jurisdiction for that purpose is not retained by reason of an ineffectual attempt to move for a new trial.

APPEAL from an order of the district court. The opinion states the facts.

Hoge & Burmester, for the appellant.

Marshall & Royle, for the defendant.

ZANE, C. J. This is an appeal from an order of the court below, overruling a motion to set aside a judgment on the verdict. The plaintiff filed his complaint, duly verified, claiming the personal property described, and alleging its value to be two thousand five hundred dollars. The defendant answered, admitting the right and title of one billiard table to be in plaintiff, and denied that defendant had taken or detained it, and denied the allegation of right in plaintiff to the other property, but did not deny the allegation of value. Defendant also justified taking the goods, except the billiard table mentioned, as United States marshal, under a writ of attachment against Robert Burns, in favor of Livingston & Co., alleged property in the former, indebtedness from him to the latter, and that plaintiff took the goods under legal process, which defendant was so holding them.

Section 1,290 complied laws, Utah, provides that every material allegation of the complaint, when it is verified, not specially controverted by the answer, shall, for the purpose of the action, be taken as true, and allegation of new matter in the answer, shall, on the trial, be deemed controverted by the adverse party. Under this statute, the pleadings presented an issue on plaintiff's right, on property in Burns, on the justification under the attachment, and on the taking of the goods afterwards by the plaintiff. These issues were submitted to a jury, who, on the twenty-fifth day of May, 1883, returned the following verdict: "We, the jury, find for the defendant on the issues in the above entitled cause." And the court, on the same day, adjudged that defendant recover of the plaintiff the possession of the property described in the complaint, except the billiard table, admitted in the answer, to belong to plaintiff, or two thousand five hundred dollars in case delivery could not be had. On June 21, 1884, the plaintiff filed a notice of motion to set aside the judgment. 1st. Because it was not supported by the pleadings. 2nd. Because it was not supported by the verdict. We find no error in the pleadings.

The property described in the complaint alleged to be of the value of two thousand five hundred dollars, included a billiard table conceded to plaintiff. The value of this table is not averred and does not appear; but assuming it to be worth something, the value of the property found for the plaintiff was less than two thousand five hundred dollars. It was error to enter up judgment for the full amount alleged in the complaint, including the value of plaintiff's table, in case a delivery of the property could not be had. This error, however, did not render the judgment void. The court having obtained jurisdiction over the person and over the subject matter, error in the exercise of that jurisdiction did not make the judgment void: Freeman on Judgments, sec. 135.

More than a year intervened between the twenty-fifth day of May, 1883, the date of this judgment, and the twenty-first day of June, 1884, when the notice of the motion to set it aside was filed, and

several terms of the district court in which it was rendered had invened.

After an adjournment of a term of court at which a judgment is rendered, the court loses all power to set it aside on motion made at a subsequent term, in the absence of a statute authorizing it to be done: 1 Estee's Plead., 2nd ed., page 33; Carpenter v. Hart, 5 Cal., 407; De Castro v. Richardson, 25 Cal., 52.

It appears from the record that on June 20, 1883, twenty-six days after the date of the judgment and during the term at which it was rendered, the plaintiff filed an affidavit in which he stated certain reasons for a new trial, and on the twenty-seventh day of the same month this affidavit appears to have been served on defendant. This is all that appears on the record with respect to the motion. The plaintiff urges that the effect of these steps towards a motion for a new trial, was to retain jurisdiction in the court over the case for the purpose of the motion to vacate the judgment. No such notice of motion as is required by section 1,420 of the compiled laws of Utah, 1876, was given. The failure to comply with the laws with respect to the motion, with the further fact that no notice appears to have been taken of it by the court or counsel, authorizes the inference that the motion for a new trial was abandoned.

The order of the court below appealed from is affirmed.

POWERS, J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 11,024.

BOTTO v. VANDAMENT.

Department Two. Filed August 22, 1885.

JUDGMENT ON PLEADINGS WHEN NOT AUTHORIZED.—A judgment on the pleadings cannot be rendered, if the answer denies the material facts stated in the complaint, even if the answer sets up a special defense separately stated, which admits the allegations formerly denied, and such defenses are inconsistent.

THE SAME—INCONSISTENT DEFENSES.—In an action for damages for the diversion of water and for an injunction, the defendant pleaded title in himself under the statute of limitations, and specially denied the allegations of the complaint. He also set up that his wife was the owner of the water and the water privileges in dispute, that he was in possession as her agent, and disclaimed any further interest in the subject matter of the suit. *Held*, that the answer raised issues of fact, and that a judgment for the plaintiff on the pleadings was erroneous.

APPEAL from a judgment of the superior court of Amador county, entered in favor of the plaintiff. The opinion states the facts.

Eagon & Armstrong, for the appellants.

Rust & Caminette, for the respondent.

FOOTE, C. This cause comes here from the superior court of Amador county, on appeal from a judgment for the plaintiff on the pleadings. The plaintiff sued for damages for the taking of water from a ditch belonging to her, and for the restitution of certain water and water privileges, and prays for a perpetual injunction to restrain the defendant from further using or interfering with said water or water privileges.

The defendant denied specifically the allegations of the complaint, plead the statute of limitations of five years, under section 319, code of civil procedure, and as a further and separate defense plead that his wife, Julia A. Vandament, was the true owner of the ditch, the water and water privileges, and that he, by her permission and as her agent, was using the same, and disclaimed any further right of possession to or interest in the subject matter of the suit.

The case at bar being in this condition, a motion was made by the plaintiff for judgment on the pleadings, and that motion was granted and judgment in accordance with it rendered by the trial court.

This court said, in the case of Hicks v. Lovell, 64 Cal., 17, citing Prost v. More, 40 Cal., 347: "It is only where an answer admits, or leaves undenied, the material facts stated in the complaint, that a judgment can be rendered on the pleadings."

It has been also held by this court, in the cases of Nudd v. Thompson, 34 Cal., 39, and Amador County v. Butterfield, 51 Cal., 526, that judgment cannot be rendered on the pleadings, where the material allegations of the complaint are denied in the answer, even if the answer sets up a special defense separately stated, which admits the allegations formerly denied. No motion was made to strike out any part of the answer, or any demurrer interposed.

If it be true that the several defenses set up in the answer are not consistent with each other, nevertheless a moving party would not be entitled on that account to judgment on the pleadings, as this court has held in Buhne v. Corbett, 43 Cal., 269; Billings v. Drew, 52 Cal., 565, and other well known cases.

In this case a plea of the statute of limitations was set up and was neither stricken out nor demurred to, hence an issue of fact remained which the defendant was entitled to have tried.

And the defense set up that the defendant's wife owned the subject matter of the suit, and that he as her agent and by her authority was in possession of and using the same, raised another issue of fact entitled to trial: Farmers' and Mechanics' Bank v. Christensen, 51 Cal., 571.

The judgment on the pleadings rendered in this case is not warranted in law, and a new trial ought to be granted in accordance with the views herein expressed.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded for a new trial.

No. 9,563.

DREYFUSS v. TOMPKINS.

Department Two. Filed August 22, 1885.

JUDGMENT—CLERICAL ERRORS—AMENDMENT.—Clerical errors in a judgment, where they are shown by the record, may be corrected at any time, so as to make the judgment entry correspond with the judgment rendered. And this may be done even after an appeal and affirmance of the judgment.

THE SAME.—In an action to recover possession of certain personal property, the jury found that the plaintiff was the owner of the property, and entitled to its return, or, if a return thereof cannot be had, then for the sum of four hundred dollars, with interest thereon from June 16, 1882. As entered, the judgment read, after reciting the verdict, that plaintiff have and recover from the defendant "costs and disbursements incurred in this action amounting to the sum of ninety-five and fifty one-hundredths dollars." On appeal the judgment was affirmed. *Held*, that after the filing of the remittitur in the lower court the judgment could be amended so as to conform to the verdict.

APPEAL from an order of the superior court of Nevada county, amending a judgment in favor of the plaintiff. The opinion states the facts.

Cross & Simonds, for the appellant.

J. M. Walling, for the respondent.

BELCHER, C. C. This was an action to recover the possession or value of certain personal property. The case was tried before a jury, and by the verdict it was found "that the plaintiff is the owner of the property described in the complaint and entitled to its return, or, if a return thereof cannot be had, then for the sum of four hundred dollars, with interest thereon from June 16, 1882."

The judgment was entered up by the clerk on the second day of April, 1883, and, after reciting the verdict, added: "Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed, that said L. W. Dreyfuss have and recover from said E. O. Tompkins costs and disbursements incurred in this action, amounting to the sum of ninety-five and fifty one-hundredths dollars." The case was then appealed by the defendant to this court, where the judgment and order were affirmed. The remittitur was filed in the court below on the twenty-eighth day of February, 1884, and on the next day the plaintiff gave notice of a motion to amend the judgment by inserting after the word "Tompkins," and before "costs," the words "the property described in the complaint, or, if a return thereof cannot be had, then for the sum of four hundred dollars, with legal interest thereon from June 16, 1882."

At the hearing of the motion, counsel for plaintiff read the judgment as entered by the clerk, and introduced no other evidence. The motion was granted, and the judgment was amended accordingly. This appeal is from the order allowing the amendment.

It is well settled that clerical errors in a judgment, where they are shown by the record, may be corrected at any time, so as to make the judgment entry correspond with the judgment rendered: Swain v. Naglee, 19 Cal., 127; Freeman on Judgments, secs. 70 and 71. And this may be done even after an appeal and affirmance of the judgment: Rousset v. Boyle, 45 Cal., 64.

In this case the error complained of appeared on the face of the record, and it was the duty of the court to correct it on motion. The judgment and order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 9,982.

PENDOLA *v.* ALEXANDERSON ET AL.

Department Two. Filed August 22, 1885.

MORTGAGE—FORECLOSURE—RENTS AND PROFITS—PURCHASER AT SHERIFF'S SALE.—A mortgagee, who purchases the mortgaged property at a foreclosure sale, is not entitled to receive any of the rents and profits which accrued prior to the time of his purchase. Nor can he maintain an action against a receiver of such property, for the rents and profits, until they have been collected and received by him.

APPEAL from a judgment of the superior court of Sierra county, entered in favor of the defendants. The opinion states the facts.

Van Clief & Wehe, for the appellant.

John Gale, for the respondents.

BELCHER, C. C. The defendants, Andrew and Nellie Alexanderson, were husband and wife, and had one minor child; they had no common property, but the husband owned all the property described in the complaint as his separate property. On the second day of November, 1881, the wife commenced an action against her husband for a divorce, and asked for the custody of the child and for alimony; and, on the same day, filed a notice of *lis pendens*, containing the names of the parties, the object of the action, and a description of the property of the husband.

After the filing of the *lis pendens*, but, on the same day, the appellant, Pendola, in good faith and without any intention of preventing the wife from securing the payment of any alimony that might be adjudged to her, took a mortgage from the husband upon all of his said separate property, to secure an indebtedness of about one thousand one hundred dollars, which mortgage was then duly recorded.

On the twelfth day of November, 1881, the action for divorce was tried, and a decree entered, granting to the plaintiff a divorce, the custody of the minor child, and alimony at the rate of forty-five dollars per month until the further order of the court, payable out of the rents, issues and profits of the said separate property of the husband; and it was further decreed that the alimony "be a first charge" upon the said property. To secure the payment of the alimony, the court appointed the defendant, Fendingham, receiver, with authority to take possession of the property and to collect and pay over the rents, issues and profits thereof. Fendingham accepted the trust, and continued to act under his appointment until this action was tried.

In March, 1884, the appellant commenced an action to foreclose his mortgage, but did not make Fendingham or Nellie Alexanderson parties to the action. In June he obtained a degree of foreclosure and under that decree, on the nineteenth day of July, 1884, all of the mortgaged property was sold and bid in by him for the sum of one thousand two hundred and sixty-eight dollars and fifty-nine cents, the amount then due, with costs of sale.

This action was commenced on the twenty-first day of July, 1884, to recover from the receiver Fendingham, "all the proceeds, rents, issues and profits, received or to be received by him from the property above described as that sold to plaintiff by said sheriff," and for such other relief as should seem equitable.

This case was tried, and on the twenty-ninth day of September, judgment was entered, in effect requiring the receiver, within ten days after service on him of a copy of the judgment, to pay to Nellie Alexanderson the amount due her for alimony up to July 21, 1884, and to pay to the clerk of the court for the use and benefit of the plaintiff all the balance of the money then in his hands, derived from the rents, issues and profits of the property which he had held as receiver, less the expenses of his receivership; and it

further required him to render to the court a full account of his receipts and his disbursements at the time of such payments.

The appeal is from this judgment, and rests upon the judgment roll.

It is not easy to see how appellant can complain of the judgment. He was not entitled to receive any of the rents and profits which accrued prior to the time of his purchase of the property at the sheriff's sale, code of civil procedure, sec. 707, and that was only two days before this action was commenced. Nor could he sue and recover for such rents and profits until they were collected and received by the defendant. It does not appear that any rents and profits from the property came into the hands of the receiver during those two days, or even during the two months and twelve days which elapsed between the time of his purchase, and the entry of the judgment. Under the circumstances, it would seem that the appellant took under the judgment all that he could possibly be entitled to.

The question discussed by counsel, as to whether the filing of the *lis pendens* and the subsequent judgment awarding alimony created a lien on the property superior to the lien of the mortgage, does not arise in the case.

The judgment should be affirmed.

SEARS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

No. 9,438.

ESTATE OF ROBERTS.

Department Two. Filed August 22, 1886.

ESTATE OF DECEASED PERSON—FURTHER FAMILY ALLOWANCE.—Under section 1,466 of the code of civil procedure, the widow of a deceased person, is entitled to a further family allowance out of the estate, when it appears that the allowance previously made, is insufficient for her necessary wants, and the estate is solvent.

APPEAL from an order of the superior court of Stanislaus county, denying a petition for a further family allowance. The opinion states the facts.

W. E. Turner, for the appellant.

George W. Schell, for the respondents.

FOOTE, C. This is an appeal from an order denying the petition of a widow for a further family allowance; the sum of fifty dollars per month during six months had been previously allowed her.

There is no evidence in the record that the homestead affords any income to the widow, the small amount of personal property set aside to her does not, and the former allowance made has long since become exhausted in supplying her necessary wants; she therefore appears before the court practically destitute and in poor

health. The estate is still in process of settlement, and appears to be solvent.

This state of facts existing, we are of opinion that under section 1,466, code of civil procedure, the widow was entitled to have made her by the court below such reasonable allowance as was necessary for her maintenance during the progress of the settlement of her husband's estate. This right seems to have been denied the petitioner, and for that reason we are of opinion that the order of the court below should be reversed, and such allowance made to her as her necessities and the amount of the estate left undistributed in the hands of the executor will warrant.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the order is reversed.

No. 9,942.

ESTATE OF ROBERTS.

Department Two. Filed August 22, 1885.

A PARTIAL DISTRIBUTION ORDERED IN THE PRESENT ESTATE, upon the petition of certain distributees, the others consenting.

APPEAL from an order of the superior court of Stanislaus county, overruling a demurrer to a petition for a partial distribution of the estate of a deceased person, and from an order for such distribution. The executor opposed the petition mainly for the reason that the widow of the deceased had petitioned for a further family allowance; that her petition was denied by the lower court, and an appeal had been taken from the order denying the petition; and that, pending such appeal, the amount of the estate to be distributed could not be determined.

E. T. Stone, for the appellant.

George W. Schell, for the respondents.

FOOTE, C. This is an appeal from an order overruling a demurrer, and one making partial distribution of a small estate.

The demurrer to the petition was properly overruled.

All the distributees of the estate were parties applying for, or consenting to, the distribution.

The executor of the estate to be distributed objects to the action of the trial court.

We are of opinion that the orders of the court below made in the premises should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the orders are affirmed.

No. 8,370.

FULKERTH v. COUNTY OF STANISLAUS.

Department Two. Filed August 22, 1885.

SHERIFF—FOOD FURNISHED PRISONERS—REASONABLE COMPENSATION HOW DETERMINED.—A sheriff who furnishes necessary food to the prisoners in jail is entitled to be paid a reasonable compensation therefor, under section 1,611 of the penal code. What is a reasonable compensation is to be determined, in the first instance, by the board of supervisors; such determination is not final, and if the sheriff be dissatisfied therewith, he has the right to sue the county for the amount which he claims to be reasonable.

APPEAL from a judgment of the superior court of Stanislaus county, entered in favor of the defendant. The opinion states the facts.

C. C. Wright, for the appellant.

Wm. O. Minor, for the respondent.

BELCHER, C. C. The plaintiff was sheriff of the defendant county during the year 1881, and as such furnished meals to the prisoners confined in the county jail. For the meals so furnished he made out an account in proper form and duly verified, and presented it to the board of supervisors for allowance. In this account he charged twenty-five cents for each meal furnished. The board acted upon the account and found it to be a proper county charge, but considering it greater in amount than was justly due, allowed twenty cents only for each meal. The plaintiff being dissatisfied with the amount allowed him, within six months after the final action of the board, commenced this action to recover the amount claimed by him to be due. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and its demurrer was sustained. The plaintiff declined to amend his complaint and thereupon judgment was entered in favor of the defendant. The appeal is from this judgment.

For the respondent it is insisted—and this is the only point made—that the board of supervisors, in allowing or disallowing claims against the county, acts in a quasi-judicial capacity, and that its action in this case was made final and conclusive by the provisions of section 1,611 of the penal code. That section reads as follows: "The sheriff must receive all persons committed to the jail by competent authority, and provide them with necessary food, clothing and bedding, for which he shall be allowed a reasonable compensation, to be determined by the board of supervisors."

We do not think the words "to be determined by the board of supervisors" had the meaning and effect claimed for them.

All claims against the county must be presented to the board of supervisors for allowance, and where the amount of the claim has not been fixed by statute or the judgment of some competent court, the board is required, if it be a proper county charge, to find and allow the amount which is justly due: Political code, sec. 4,074.

If the board allows less than is claimed, and claimant is dissatisfied with the amount allowed him on his account, he "may sue the county therefor at any time within six months after the final action of the board, but not afterwards; and if in such action judgment is recovered for more than the board allowed, on presentation of the judgment, the board must allow and pay the same, together with the costs adjudged; but if no more is recovered than the board allowed, the board must pay the claimant no more than was originally allowed:" Political code, sec. 4,075.

This provision is general, and applies to all accounts presented against the county.

By subdivision 4 of section 4,344 of the same code, the "expenses necessarily incurred in the support of persons charged with or convicted of crimes, and committed therefor to the county jail," are made county charges.

The plaintiff, having furnished "necessary food" to the prisoners in jail, was entitled to a "reasonable compensation" therefor. What was a reasonable conpensation was to be determined by the board of supervisors in the first instance, but that determination was no more final than would have been the finding by the board of the amount which was justly due, if the account had been presented for any other proper county charge.

"To determine what is a reasonable compensation," and "to find what is justly due," are expressions, we think, of equivalent import. The plaintiff, being dissatisfied with the amount allowed him on his account, had the right, therefore, to sue the county for the amount which he claimed to be reasonable.

The cases cited by counsel for respondent from the reports of this state do not touch the question involved here, and those cited from New York are not in point, for the reason that no law existed in that state providing for suit upon a claim disallowed, in whole or in part, by the board: Chase v. The County of Saratoga, 33 Barb., 603; Martin v. Board of Supervisors, 29 N. Y., 645; Price v. The County of Sacramento, 6 Cal., 254.

Judgment should be reversed and the cause remanded, with direction to the court below to overrule the demurrer.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded, with direction to the court below to overrule the demurrer.

No. 9,718.

DAMSGUARD, ASSIGNEE, ETC., *v.* GUNNOLDSON.

Department Two. Filed August 22, 1885.

FINDINGS—EVIDENCE—WRONGFUL WITHHOLDING PROPERTY FROM ASSIGNEE.—The findings that the defendant had wrongfully and fraudulently withheld possession of a certain mill tract of land from the plaintiff, after due notice to yield its possession and that of the saw-mill and logs and appurtenances; that by these wrongful and fraudulent acts the plaintiff had been kept out of possession of such property, and that the defendant had thus caused damage to the estate of the insolvent in the hands of the assignee, reviewed, and held supported by the evidence.

OVERRULING DEMURRER—SPECIFICATION OF ERROR.—Error specified to have occurred in overruling a demurrer to the complaint, will not be considered on appeal, if no demurrer appears in the transcript.

THE ADMISSION OF INCOMPETENT EVIDENCE, if without prejudice to the appellant, will not warrant a reversal.

THE RECORD REVIEWED AND HELD TO SHOW no material error.

APPEAL from a judgment of the superior court of Placer county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Jo Hamilton and *J. E. Prewett*, for the appellant.

J. M. Fulweiler and *Hale & Craig*, for the respondent.

FOOTE, C. This is an appeal from a judgment and from an order denying a motion for a new trial.

The plaintiff is the assignee of one Phillip Lang, who had been adjudged an insolvent, under the act of April 16, 1880, of the legislature of California.

The assignee claimed, in the action brought by him against Gunnoldson, that the insolvent, Lang, in contemplation of insolvency, and with a view to defraud his creditors, had conveyed certain pieces of real property to Gunnoldson, and that Gunnoldson, upon application duly made for the restitution and possession of the property, had refused to either make a conveyance of it to the assignee, or to give him possession of the same, and that Gunnoldson had kept possession thus wrongfully of a certain saw mill and tract of land on which it stood, and had prevented by his acts of pretended ownership, the assignee from getting possession of a large number of saw-logs lying and being on the mill tract of land, and sawing them up into lumber or otherwise utilizing them for the benefit of the insolvent's estate. He further charged in his complaint that by the wrongful and deceitful acts of Gunnoldson the estate of the insolvent in his hands for distribution had been damaged to the amount of several thousands of dollars.

The defendant answered the complaint and denied specifically its allegations, and set up, by way of defense, the fact that he had a lien upon the mill tract of land for about nine hundred dollars, with interest, and that although he had a deed to the land in the form of bargain and sale, he only claimed it to be a mortgage to secure his debt, and upon the issue thus made up, the case went to trial, a jury being waived.

A judgment was rendered in the court below for the plaintiff against the defendant for the sum of nine hundred and twenty-five dollars damages and costs, the defendant's mortgage was recognized as a lien upon the property to secure his debt and interest, and the plaintiff, subject to this lien, was declared to be the owner of the property set out in the deed to Gunnoldson from Lang.

A motion for a new trial was made and denied, and this appeal was taken.

The specifications of the insufficiency of the evidence, state, among other things, that the court found contrary to the evidence, in its sixth, seventh, eighth, ninth and tenth findings of fact.

The main questions under those findings were, had the defendant wrongfully and fraudulently withheld possession of the mill tract of land from the plaintiff after due notice to yield its possession and that of the saw mill and logs and appurtenances? And, if so, whether by these wrongful and fraudulent acts the plaintiff had been kept out of possession of the mill, land, saw logs, etc.? And whether the defendant had thus caused damage to the estate of the insolvent in the hands of the assignee, and, if so, how much?

It is plain that upon all these questions the evidence was conflicting, as a reference to the statement on motion for new trial—which is exceedingly full—shows. The letter of the defendant of itself makes it evident that he refused to deliver possession of the premises demanded of him; the testimony of John Meyer, P. Lang, Mrs. Annie Lang and J. Howser, certainly went to prove the effort made by the defendant to induce the plaintiff to believe that he, the defendant, was the absolute owner of the land and saw mill standing on it, and would not yield the possession of them to him, perhaps with a view to a forced sale and the sacrifice of the saw logs at such sale, which might in that event be bought by the defendant at a nominal price, perhaps with the view and hope that he might be permitted to hold on to the land and saw mill as an owner in fee simple.

The evidence tended to show that Gunnoldson wished to conceal from the plaintiff, the exact nature of the deed from Lang of the property in question, for we have seen that he never explained in the first instance to Meyer, the plaintiff's agent, to what extent his title and the conveyance he held really went. Had Gunnoldson intended to deal fairly with the assignee, he would at the first interview with the agent not only have offered in plain terms to give up the property, cancel the deed he held if paid the debt he held against it, but he would have explained without hesitation the whole connection he had with it; instead of pursuing this course, he chose rather to act differently, he went to a lawyer and caused the letter which is in evidence to be written, in which he not only declares that he will not give up the land on which stood the saw mill and lay the logs, but he even ridicules the pretensions of the assignee to demand it.

The evidence makes manifest the fact that the saw logs depreciated in value by reason of the plaintiff being unable to saw them up into lumber or otherwise utilize them, and that his efforts to do this in good faith were frustrated by those of the defendant trying to induce the belief in the plaintiff that his title as assignee to the property was worthless and his own good.

The plaintiff appears from the evidence to have done all that a prudent and honest man could, to recover possession of the land, saw mill and logs of timber, and to utilize them for the benefit of the insolvent's estate, and that he did not do so, is entirely due to the conduct of the defendant, who sought to deceive him and embarrass his action, and succeeded in his efforts. And this deceitful conduct on the part of the defendant continued until the time had come when the saw logs were practically worthless.

The evidence as to the quantity of the logs and their value was somewhat conflicting, but both quantity and value as fixed by the court were, we think, fair, taking all the testimony into consideration.

The court allowed the plaintiff the value of the logs at the time when they could have been utilized for lumber or sold, at one thousand seven hundred dollars; that is, four hundred and twenty-five thousand feet of saw logs at four dollars per thousand; this was fair; it then reduced this amount by the sum of three hundred and fifty dollars, which the evidence showed it would have cost the plaintiff to put the saw mill in repair in order to saw up the logs, and by the sum of four hundred and twenty-five dollars, which was the value of the logs at the time when the defendant eschewed all claim to the land and mill and first set up his mortgage claim only; that left the sum of nine hundred and twenty-five dollars as the actual damage the insolvent estate had suffered by the wrongful and fraudulent acts of the defendant, and for that sum of money and costs the court, as we think, was warranted, in view of all the evidence, in giving judgment in favor of the plaintiff. At best, the defendant can only claim that the evidence was conflicting, and that is not sufficient to overturn the findings of facts in a trial court.

The first specification of errors of law alleged by the defendant is that the court erred in overruling defendant's demurrer to the complaint. The transcript in the case does not disclose that any demurrer was ever filed or overruled in the case; hence, of course, this specification cannot be noticed here.

As to the second specification, we think the facts clearly showed that the damages awarded by the court were legal and proper.

So as to the third.

As to the fourth specification, we think there was no error by the court.

As to the fifth, the evidence alleged to have been improperly admitted was, we think, not incompetent, with a view of showing the diligence of plaintiff in endeavoring to utilize the saw logs, and the difficulties that lay in the way of this desired action.

As to the sixth exception, we think it proper to say that even had it been incompetent, it could not have injured the defendant's cause, nor did it have that effect.

As to the seventh exception, the ruling of the court was without error.

As to the eighth specification, we think that even if what followed the word "similar," in the answer of Lang to a question by the defendant's attorney, was not strictly responsive to the question and irrelevant; nevertheless, it could not have had, and did not have, any effect injurious to the defendant.

In reference to the ninth specification, we are of opinion that the court rendered such a judgment upon the facts as found as was consistent with them.

For the court to have proceeded outside of the issues made by the pleadings, and ordered a sale of the premises under the mortgage held by the defendant, was not proper.

The issue as to the mortgage matter, as made by the pleadings, was whether the conveyance of May the 4th, 1881, being on its face a deed in fee simple, was, under the facts evidenced in the case, void *in toto* for fraud, or whether it was good as a mortgage and not void; and upon that issue, as made, the court found properly, in our opinion.

For these reasons, we think the judgment of the court, as well as its order denying the motion for a new trial, ought to be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 20,092.

PEOPLE v. PRICE.

In Bank. Filed August 22, 1885.

INSTRUCTIONS—FAILURE OF JURY TO HEAR.—The fact that the jury did not hear the instructions of the court, because of noise in the court room, will not warrant a reversal.

GRAND LARCENY—DEGREES OF CRIME—VERDICT.—Under sections 486 and 487, of the penal code, there is but one degree of grand larceny. Consequently, under an information charging the defendant with grand larceny, in taking the sum of eleven dollars from the person of another, a verdict finding the defendant guilty, is sufficient in form.

APPEAL from a judgment of the superior court of San Joaquin county, entered upon a verdict convicting the defendant of grand larceny. The opinion states the facts.

Budd & Budd, for the appellant.

E. C. Marshall, attorney general, for the respondent.

MORRISON, C. J. The defendant was informed against in the superior court of San Joaquin county, for the crime of grand larceny, committed by feloniously stealing from the person of another, the

sum of eleven dollars, and, on the trial, the jury rendered the following verdict:

"We, the jury, in the above entitled cause, find the defendant guilty, and recommend him to the mercy of the court."

A motion for a new trial was made in the case, which was denied by the court, and the appeal is prosecuted from the judgment, as well as the order denying the motion for a new trial.

There are two points made in the appeal, the first of which is, that the jury did not hear the instructions given by the court. There is no evidence that the instructions were not heard by the jury, excepting the affidavit of the attorney that *he* did not hear them, and, therefore, it by no means satisfactorily appears that the point is well taken in fact; but conceding that it is, it furnishes no reason in law for our interfering with the judgment. If it be true as a matter of fact that the jury did not hear the instructions of the court, because, as stated, there was so much noise in the court room at the time, the court should have been requested to repeat the instructions in such a manner, and at such a time, that they could have been heard by the jury. It would be unfair to the prosecution to allow the case to go to the jury under such circumstances, and then set aside the verdict, if adverse to the defendant, for any such reason.

The other point is that the verdict is a nullity, inasmuch as it does not conform to section 1,157 of the penal code, which provides that "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

The only question in the case is whether the crime with which the defendent was charged and of which he was convicted is distinguished into degrees. If it is, the verdict of the jury is clearly imperfect and bad under the foregoing section of the penal code.

By section 486 of the penal code "larceny is divided into two degrees, the first of which is termed grand larceny; the second petit larceny;" and by section 487 grand larceny is committed in either of the following cases:

"1. When the property taken is of a value exceeding fifty dollars.

"2. When the property is taken from the person of another.

"3. When the property taken is a horse, mare, gelding, cow, steer, bull, calf, mule, jack, goat, sheep or hog."

Section 488. "Larceny in other cases is petit larceny."

In the case we are now considering the defendant was charged with the crime of grand larceny, inasmuch as he was accused of stealing money from the person of another.

It will be observed that the defendant was charged in the information with the crime of grand larceny, and it was further charged that the stolen goods were taken from the person of another. Now, there is under the law but one degree of grand larceny when the property stolen is of the value of fifty dollars or fifty thousand dollars, and every larceny committed by taking from the person of

another, is in its degree grand larceny. So that in either aspect of the case the charge against the defendant was the crime of grand larceny, which, as already remarked, is without degrees, and the verdict of the jury finding the defendant guilty was guilty as charged; that is to say, guilty of grand larceny.

In the case of the People v. Whitley, 64 Cal., 241, in which the defendant was charged with the crime of grand larceny, the verdict was "guilty as charged," and it was held sufficient. In our opinion the same rule is justly applicable to the case now before us. There is nothing doubtful or uncertain in the verdict.

Judgment affirmed.

ROSS, J., MCKINSTRY, J., MCKEE, J., THORNTON, J., and MYRICK, J., concurred.

No. 11,028.

WIXSON v. DEVINE.

Department Two. Filed August 22, 1885.

OPINION OF JUDGE NOT ADMISSIBLE IN EVIDENCE.—The opinion of the judge who tried the case is no part of the judgment roll, and is not admissible in evidence.

PRIOR RECOVERY—RECORD HOW FAR CONCLUSIVE.—A record is not conclusive as to the truth of any allegations which were not material and traversable, but as to things material and traversable it is conclusive and final. And as to questions thus essential and thus determined, the judgment is, as a plea, in bar, or, as evidence, conclusive between the same parties, upon the same matter, everywhere.

THE SAME.—Upon a comparison of the judgment roll in a former action between the parties, with the pleading in the present case, *held*, that the same identical question, viz., the right of plaintiff to have and divert twenty-five inches of water from a certain ravine at his dam on said ravine, was a material question in issue and essential to the determination of each action; that such question was finally determined in the former cause, in favor of the plaintiff, and should not again be litigated between the same parties.

PRIOR RECOVERY IN FAVOR OF PLAINTIFF—WHEN NEED NOT BE PLEADED—ESTOPPEL.—Where a plaintiff has obtained judgment on certain issues raised by the defendant in his answer in a subsequent action, it is neither necessary or proper for him to plead such prior recovery. The prior judgment operates by way of estoppel to the defense set up by the defendant, and, as under the California system of pleadings, there is no replication to the answer, such estoppel cannot properly be pleaded.

APPEAL from a judgment of the superior court of Sierra county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

S. B. Davidson and *M. Farley*, for the appellant.

Van Clief & Wehe, for the respondent.

SEARLS, C. The action is brought for the alleged wrongful diversion of water, to the use of which plaintiff claimed the right, and for a perpetual injunction.

Cause tried by a jury; verdict for defendant. Plaintiff moved for a new trial which was denied, and the appeal is from final judgment and order overruling motion for new trial.

The record is wanting in clearness as to the precise time and point in the proceedings at which some of the objections were made and exceptions taken. It is not claimed for the two bills of excep-

tions set out in the statement on motion for new trial that they were served and settled as required by the code, but that having been prepared they were included in the statement on the motion for a new trial, and it is as a part of such statement, and not as bills of exceptions, that they will be treated.

At the trial, plaintiff offered in evidence the judgment roll in Wixson v. Devine and wife and a paper purporting to be the opinion of the judge who tried the cause, of which the judgment roll is the record, but which opinion was not signed by the judge, or in any way authenticated so as to entitle it to be received as evidence.

The court admitted the judgment roll in evidence and very properly excluded the so called opinion of the judge: Wilson v. Wilson, 64 Cal., 92; McClory v. McClory, 48 Cal., 575; Hidden v. Jordan, 28 Cal., 305.

After the judgment roll in Wixson v. Devine and wife was in evidence, the defendant, under objection, introduced testimony tending to show that the water restrained by plaintiff's dam and claimed by the latter, would, but for the dam, flow down a ravine and by percolation or by subterranean channel, find its way to a spring owned by the defendant, and claimed to be supplied by the water in question.

Plaintiff moved to strike out this testimony which was refused by the court, and the refusal is assigned as error.

The judgment roll shows that in June, 1883, J. S. Wixson, the plaintiff, brought suit against Thos. Devine, the defendant in the case, and Honora Devine, his wife. The complaint avers plaintiff to be seized and possessed of a certain dam in Kentucky ravine, together with the usufructory first right to the use of twenty-five inches of water of said ravine, for irrigating, farming, culinary and domestic purposes, and that the said waters, by means of a flume and ditch, are conducted to plaintiff's residence and there used, etc.

That, on or about April 21, 1883, Honora Devine, one of the defendants, tore away and removed the plaintiff's said dam, and diverted the said waters of said ravine from plaintiff's flume and ditch, and wholly prevented said twenty-five inches of water from flowing to plaintiff's residence, etc., whereby plaintiff was deprived of the use thereof, and his flume left to dry, etc., and claims damages in the sum of three hundred dollars.

The complaint further avers a repetition of the alleged wrongful acts, shows the necessity of the water to plaintiff, and contains apt allegations as to the insolvency of defendants and the propriety of a temporary injunction, and prays for damages and a perpetual injunction.

Defendants answered, denying that plaintiff ever was seized or possessed of, or entitled to the possession of, the dam described in the complaint, or that he was entitled to, or possessed or seized of, the usufructory first right to any water of said ravine for any purpose.

They admit plaintiff built a flume and ditch to divert said water from said ravine, but aver that he did so wrongfully, and had no right so to do.

They deny breaking a dam, but admit removing obstructions from this ravine, which prevented the natural and rightful flow of the waters, as they had a right to do. They further deny all damage to plaintiff.

Defendants, after answering the allegations upon which a prayer for injunction is based, proceed to claim a prescriptive right to the water by an adverse use by themselves and grantors for twenty years.

As a further separate answer, the defendants claim ownership of all the water of Kentucky ravine, by virtue of a location and appropriation thereof in 1879, and of continuous use and possession since that date.

The cause was tried by the court without a jury, findings were waived, and on the eleventh day of September, 1883, judgment was rendered in favor of plaintiff, and against defendants therein, for one dollar damages, costs taxed at eighty-one dollars and sixty cents, and granting a perpetual injunction restraining defendants from interfering with plaintiff's dam at the head of his flume, or his flume or ditch, "or from interfering with or turning out any waters from Kentucky ravine after said waters shall have reached plaintiff's dam, so long as the quantity shall not exceed twenty-five inches," etc.

The issue as to the right to have and use twenty-five inches of the water of Kentucky ravine was clearly made by the pleadings, and, as a result of the trial, plaintiff had judgment.

The judgment was rendered upon the merits—was between the parties to this action, and related to the same subject matter.

The right to use twenty-five inches of water from Kentucky ravine was an element essential to a recovery by plaintiff in the former action. It was not a matter coming collaterally in question, or incidentally cognizable in the case, but formed the basis of his action. If such ownership or right to the water did not exist in plaintiff, he could not under the pleadings be entitled to recover.

It was the very point in issue and was determined in the cause. The dam described in the complaint, and which one of the defendants was charged with destroying, was but a means to an end; the water was the essential thing to be enjoyed and the dam was but the instrumentality for securing it. Some stress seems to be laid upon the fact that the perpetual injunction forming a part of the final judgment only restrains defendants from interference with plaintiff's dam, at the head of his flume, and with his flume and ditch, and "from interfering with or turning out any waters from Kentucky ravine, after said waters shall have reached plaintiff's dam, so long as the quantity reaching said dam shall not exceed twenty-five inches," etc. The prayer of the complaint in that respect was that defendants be restrained from interfering with the dam or diverting the said waters therefrom or from said flume or ditch.

The relief awarded follows substantially the prayer and is as broad as, technically considered, plaintiff was entitled to. We should, however, look beyond the injunction to the general scope and effect of the judgment.

The paramount object of the action, as gathered from the pleadings, was to determine the right to twenty-five inches of water of Kentucky ravine at plaintiff's dam or point of diversion, and the judgment in his favor for one dollar damages could not properly be entered until the right was determined in his favor.

If defendants were entitled to the water of Kentucky ravine, the dam of plaintiff, which prevented its flow, was an obstacle to their enjoyment; was a nuisance which they had a right to abate, and in the answer they substantially admit removing it and claim the right so to do.

There should be a limit to litigation. The same cause of action ought not to be brought twice to a final determination. Justice is promoted by having every cause once fairly and impartially tried; but once as tried, justice is satisfied and public tranquility demands that all litigation of that question, and between those parties, should be closed forever. If error has crept into the proceedings, provision is made for correcting such error by an application for a rehearing, or by appeal. Failing in this, the best interests of society are promoted by treating the judgment as imparting absolute verity, and as conclusive between the parties and privies, of every material question directly in issue, and necessary to the determination: Greenleaf on Evidence, sec. 522.

A record is not conclusive as to the truth of any allegations which were not material and traversable, but as to things material and traversable, it is conclusive and final.

And, as to questions thus essential, and thus determined, the judgment is, as a plea, in bar, or, as evidence, conclusive between the same parties, upon the same matter, everywhere.

A comparison of the judgment roll in the former cause, with the pleadings in this, satisfies us that the same identical question, viz.: the right of plaintiff to have and divert twenty-five inches of water from Kentucky ravine, at his dam on said ravine, was a material question in issue and essential to the determination of each of said causes, that such question was finally determined in the former cause, and should not again be litigated between the same parties.

It was not necessary or proper for plaintiff to plead his former recovery. It operated by way of estoppel to the defense set up by the defendant, and as we have, in our system of pleadings, no replication to the answer, the estoppel could not properly be pleaded: Clink v. Thurston, 47 Cal., 30; Flandreau v. Downey, 23 Cal., 358.

The record of the judgment introduced in evidence, precludes the defendant from setting up any right to twenty-five inches of water in Kentucky ravine, at the point of plaintiff's diversion, or at any point above, so as to interfere with his enjoyment thereof at his dam and ditch.

We are of opinion, therefore, that the testimony offered by defendant and objected to by plaintiff, and which he afterward moved to strike out, was improper, as tending to open anew a question previously determined by a final judgment between the same parties, in a court of competent jurisdiction.

If, however, on another trial, the plaintiff, under his complaint, shall claim a quantity of water in excess of twenty-five inches, measured as in said complaint prescribed, viz.: under a four-inch pressure, as possibly, under his pleadings, he may do, then, and in that event, the testimony offered will become competent in the determination of the right to such excess only.

The judgment and order should be reversed, and a new trial ordered.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order reversed, and the cause remanded for a new trial.

No. 9,803.

DUFOUR v. CENTRAL PACIFIC RAILROAD COMPANY.

Department One. Filed August 22, 1885.

NEGLIGENCE—CONTRIBUTORY—REASONABLE CARE.—To authorize a recovery for damages occasioned by the negligence of another, the plaintiff must have exercised that reasonable degree of care to avoid the injury which an ordinarily prudent person would have exercised under like circumstances.

THE SAME—PLAINTIFF'S DEGREE OF CARE.—In actions to recover for such negligence, it is necessary for the plaintiff to make out a *prima facie* case in his favor, showing that the damages claimed by him resulted from the negligence of the defendant. And where it affirmatively appears from his own evidence that the want of due prudence on his part was the proximate cause of the injury complained of, he cannot recover. But the plaintiff's right to recover is not affected by his having contributed to his injury unless he was in fault in so doing.

THE SAME—CASE IN JUDGMENT.—Plaintiff's decedent was employed by a lumber company to load lumber upon a car placed by defendant on a side track to receive its load. Before the accident happened, all the load of lumber had been placed on the car, but it had not been leveled off and secured in place so as to be fit for shipment. Decedent and his assistant were standing on the projecting ends of the longer timbers, at opposite ends of the car, leveling off the load, and preparing to fasten the same in place, when the defendant's employees, without giving any notice, ran up with a locomotive engine, coupled on to the train in which the car was standing, and had moved several hundred feet, and acquired a speed of five or six miles an hour, when two heavy jerks of the car occurred, the latter of which threw decedent from the ends of the lumber on which he was standing, between the cars, where he was killed. The time consumed in passing from the starting point to where the accident occurred was from a minute to a minute and a half. *Held*, that the court could not say as a question of law, that decedent was guilty of contributory neligence, in maintaining, as best he could, his position on the ends of the lumber, and in not climbing on top of the load.

A REFUSAL TO GIVE INSTRUCTIONS WHICH HAVE ALREADY BEEN GIVEN in substance is not error.

INSTRUCTION TO CONSIDER SURROUNDING CIRCUMSTANCES.—An instruction that the jury, in case they found for plaintiff, "must take into consideration all the circumstances surrounding the case," cannot be interpreted as authorizing them to consider facts not embraced in the pleadings or evidence.

CERTAIN INSTRUCTIONS considered and held warranted by the pleadings and evidence.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

S. C. Denson, for the appellant.

N. Greene Curtis, S. Solon Hall and *F. H. Moore*, for the respondent.

SEARLS, C. Action by plaintiff as the administratrix of her husband's estate to recover damages from defendant, a corporation, for the death of her husband through the alleged negligence of its employees. Verdict for plaintiff. Defendant appeals from final judgment and from an order denying a motion for a new trial.

Plaintiff's decedent was employed by the Friend and Terry Lumber Company to load lumber upon a car placed by defendant on a side track to receive its load. Decedent and another person were on this car loading lumber.

Before the accident happened all the load of lumber had been placed on the car, but it had not been leveled off and secured in place so as to be fit for shipment.

Decedent and his assistant were standing on the projecting ends of the longer timbers, at opposite ends of the car, leveling off the load and preparing to fasten the same in place, when the defendant's employees, without giving any notice, ran up with a locomotive engine, coupled on to the train in which the lumber car was standing, and commenced moving in a southerly direction, and had moved several hundred feet and acquired a speed of five or six miles an hour, when two heavy jerks of the cars occurred, the latter of which threw decedent from the ends of the lumber upon which he was standing between the cars, where he was killed. The time consumed in passing from the starting point to where the accident occurred was from a minute to a minute and a half.

The defense of contributory negligence is set up, and appellant makes the point that the evidence was insufficient to justify the verdict.

The position taken is, that conceding the negligence of defendant's servants, in starting the train without notice whilst decedent was at work on the lumber, still the evidence shows that no injury was done him by this negligent start, that the shocks which afterward occurred and by which he was thrown from the train, were such as might reasonably be expected in a moving freight train, and that decedent ought to and could by the exercise of common prudence have reached a safe position on the car. John J. Dufour, a brother of decedent, who was working with him on the car, and who was the principal witness for plaintiff, after describing the manner in which they were engaged, says: "There were about seven thousand or eight thousand feet of lumber on the car, which made the top of the lumber about six feet from the platform of the car, and about ten feet from the ground. My brother was standing on the north end of the car, and I on the south end. We were standing on the ends of the lumber that projected at such a height that the top of the lumber was about even with our hips.

"While we were standing in that manner, smoothing the lumber preparatory for the cleats, the switch engine hooked on without any notice to us, and started out with us. That is the first knowledge I had that they would take us away at all. Then we stopped our work and held on to the ends of the lumber with our hands, to keep from falling off. There was a slight shock when they hooked on and started. That was the first intimation we had that they were moving, or were going to move. Then we went down to the foot of N street, and just as we crossed the street there were two heavy jerks. The first threw me backward, and I caught the end of a scantling, the lumber was made up of everything—long stuff and some short stuff. Then immediately there was another shock which threw my brother off, down between the cars." Again he says: "When the engine hooked on and started down we had no chance to get off. We could not get off without climbing on top."

The general rule is, that, to authorize a recovery for damages occasioned by the negligence of another, the plaintiff must have exercised that reasonable degree of care to avoid the injury which an ordinarily prudent person would have exercised under like circumstances.

Another rule in actions of this character is, that it is incumbent upon the plaintiff to make out a *prima facie* case in his favor, showing that the damages claimed by him resulted from the negligence of the defendant. And where it affirmatively appears from his own evidence that the want of due prudence on his part was the proximate cause of the injury complained of, he cannot recover.

The plaintiff's right to recover is not affected by his having contributed to his injury unless he was in *fault* in so doing.

A plaintiff may not only contribute to, but even be himself the immediate cause of his own injury, and yet recover damages therefor.

If his share in the transaction was innocent and not incautious, it furnishes no excuse for defendant, as in a case where, by the negligence of a railroad company, the train was run into such danger, that in order to escape from greater peril the plaintiff jumped off, and thus injured himself, he recovered damages against the company: Shearman and Redfield on Negligence, sec. 28.

Where the negligence of plaintiff is relied upon to defeat his recovery, he must have been guilty of at least *ordinary* negligence. His failure to use *great* care will not defeat the action: Shearman and R., sec. 29. In the present case, it was the duty of plaintiff's decedent to use such care and diligence in protecting himself from harm as would have been exercised by a man of ordinary prudence, placed in his position.

It is claimed by defendant that he should have climbed upon the top of the lumber where he would have been safe from the shocks incident to moving freight cars upon a side track, with which we may have supposed him to have been familiar. This is an assertion easily made, but it is not clear that it could have been readily and safely accomplished.

The shocks spoken of, and which accompany the starting and stopping of a train, or altering its rate of speed, and with which decedent was familiar, may have rendered it both natural and necessary for him to do what he and his associate both did, viz., hold on to the timber. The jury may have concluded, from the circumstances, that such was the safest course to pursue.

We cannot say, as a question of law, that decedent was guilty of contributory negligence in maintaining, as best he could, his position.

The law can only define the duty of individuals under given circumstances. The existence of the circumstances is a question of fact for the jury.

Under the instructions of the court, as given, and the testimony before them, we are of opinion the jury was warranted in the verdict rendered.

Appellant takes exception to the use of the word *stop* in the sixth instruction given on request of plaintiff.

The paragraph in which the word *stop* occurs, proceeds upon the theory that if defendant, by its agents, carelessly and negligently caused the train of cars to move or start without giving any warning to deceased of its intention to move said cars and did move or start or *stop* the same with such force or violence as to cause deceased to fall of." * * *

Under the pleadings and evidence the court was warranted in giving the instruction as asked.

The gravamen of the charge, as contained in the complaint, is, that defendant, by its servants, negligently and carelessly, and without notice to deceased, did move its locomotive and cars so as "to back and move the same with great force and violence," * * * and "by reason of the great force and violence used in backing and moving said cars, and of the great shock occasioned thereby, and the failure and neglect of said defendant to give any warning or notice thereof, said deceased was thrown from, and off of, said car." * * *

Manifestly the complaint taken together, charges that by reason of the shock given to the car upon which decedent was at work, he was thrown off and killed. Whether the shock was produced by starting or stopping the train, by accelerating or checking its motion, is of little consequence, as the allegations are broad enough to authorize proof of the fact of stopping, as shown by the evidence, and the shock to the car occasioned thereby.

The refusal of the court to give the twelfth and seventeenth instructions as asked by defendant, is assigned as error.

These instructions had already been given in substance, and very nearly in the same form, at the request of defendant. The whole question of contributory negligence so far as applicable to the case made, was clearly expounded to the jury, and to have repeated the same doctrine in synonymous language or terms, or like import, was unnecessary.

In defendant's reply brief, the point is, for the first time, urged, that the seventh instruction, given at the request of plaintiff, is erroneous.

The court had instructed the jury that in case they found for plaintiff, they "must take into consideration all the circumstances *surrounding the case.*"

It is claimed the italicized words used, imparted to the jury that they were at liberty to go outside of the case, as made, for circumstances upon which to predicate their verdict. The circumstances surrounding a case, are such as are to be gleaned from the pleadings and evidence, and we must presume that it was to the circumstances appearing properly in the case, and not those outside of it, and of which the jury are not presumed to know, that the court alluded in this instruction, and that the jury so understood it.

We think the judgment of the court below, and the order denying the motion for a new trial should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 11,025.

FINN v. SPAGNOLI.

Department Two. Filed August 22, 1885.

SETTLEMENT OF STATEMENT OF CASE—DISQUALIFICATION OF JUDGE—TRANSFER OF ACTION TO ADJOINING COUNTY.—The plaintiff recovered judgment against the defendant in the superior court of Amador county on the eighteenth day of November, 1884. Thereafter, within the time allowed by law, the defendant served a notice of intention to move for a new trial, and prepared and served his statement of the case, and the plaintiff prepared and served amendments to the statement. The statement and amendments were delivered to the clerk of the court for the judge. On the fifth day of January, 1885, the term of office of the judge before whom the case was tried expired, and the attorney who tried the case for the defendant became the judge of the court. *Held*, that, under section 398 of the code of civil procedure, the plaintiff was entitled to have the case transferred to the superior court of an adjoining county, upon the ground that the judge of the court was disqualified from further acting in the case.

APPEAL from an order of the superior court of Amador county, denying a motion for a change of venue. The opinion states the facts.

Eagon & Armstrong, for the appellant.

Lindley & Spagnoli, for the respondent.

BELCHER, C. C. The plaintiff recovered judgment against the defendant in the superior court of Amador county on the eighteenth day of November, 1884. Thereafter, within the time allowed by law, the defendant served a notice of his intention to move for a new trial, and prepared and served his statement of the case, and the plaintiff prepared and served amendments to the statement. The statement and amendments were delivered to the clerk of the court

for the judge. On the fifth day of January, 1885, the term of office of the judge before whom the case was tried expired, and the attorney who tried the case for the defendant became the judge of the court. Nothing appears to have been done towards settling the plaintiff's statement till the sixth of March, when the plaintiff gave notice of his intention to move that the case be transferred to the superior court of an adjoining county, upon the ground that the judge of the court was disqualified from further acting in the case. This motion was heard on the sixteenth day of March, and at that time the judge of the superior court of Mono county occupied the bench. The motion was denied, and the appeal is from the order denying it.

A bill of exceptions or statement may be settled and certified by the judge before whom the case was tried after his term of office has expired, if he has not become disqualified, or by his successor in office, if he be not disqualified. If the former neglects or refuses to act, and the latter be disqualified, then the bill of exceptions or statement is to be settled and certified by another judge of the same county, if there be one, or by the judge of an adjoining county: Sec. 653, C. C. P.; Rule 29 of this court. The case was pending in the superior court of Amador, code of civil procedure, sec. 1,049, and the plaintiff was entitled to have the statement settled and the motion for new trial disposed of without unnecessary delay. Why the statement was not settled by the judge before whom the case was tried does not appear, but it could not be settled by his successor in office, nor by the judge of Mono county, that not being an adjoining county.

Section 398 of the code of civil procedure provides: "If an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such * * * it must be transferred for trial to a court the parties may agree upon, by stipulation in writing or made in open court and entered in the minutes; or if they do not so agree then to the nearest court where the like objection or cause for making the order does not exist."

It is claimed by the respondent that the case had been tried, and therefore it could not be transferred for trial.

This is not correct. "A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue. When a court hears and determines any issue of fact or of law for the purpose of determining the rights of the parties, it may be considered a trial:" Tregambo v. Comanche M. and M. Co., 57 Cal., 505.

Within this definition the hearing and disposition of a motion for new trial is a trial.

We think the court erred in denying the plaintiff's motion and that the order appealed from should be reversed.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the order is reversed.

No. 8,691.

DE LAURENCEL ET AL v. DE BOOM.

Department Two. Filed August 24, 1885.

ESTATE OF DECEASED PERSONS—DEVISE TO RELATIONS AS A CLASS.—The testator, a naturalized citizen of the United States, died domiciled in France. His next of kin him surviving, were three De Laurencels, children of a deceased sister, and five De Booms, children of a deceased brother. All his property was devised in trust for certain specified purposes, with a direction that after the expiration of ten years the same was to go to the De Booms and De Laurencels. In the instructions to the trustee, he directed that at that time he should "disclose to all my heirs, the De Booms, as well as the Laurencels, the state of my succession." *Held*, that the devise was to the De Booms and Laurencels, as a class, and that they were entitled to share equally.

APPEAL from an order of the superior court of the city and county of San Francisco, denying the plaintiffs a new trial. The opinion states the facts.

Edward J. Pringle, for the appellants.

Timothy J. Lyons, for the respondent.

MYRICK, J. Jean Corneille de Boom was a naturalized citizen of the United States. He died in 1870, domiciled in France. His next of kin surviving him were three De Laurencels, children of a deceased sister, and five De Booms, children of a deceased brother. He left some property in France, but the bulk of his property was in this state, consisting of real and personal estate. By the will of the deceased, which has been probated and the property distributed accordingly, all his property was devised to his nephew, Romain Camille de Boom, in trust for certain specified purposes, with a direction that after the expiration of ten years, the same was to go to the De Booms and De Laurencels. In what proportion, is the question before us. It is contended on behalf of the De Laurencels, that the nephews and nieces are to take as by right of representation according to the law of France, giving to them one-half the property, the other half going to the De Booms; while it is contended on behalf of the De Booms that the property is to be divided in equal proportions among all. The court below decreed in accordance with the latter proposition.

The instructions left by the deceased for the guidance of the the trustee contain the following clause: After ten years of administration, and after having settled with the greater portion of the creditors, you will raise money enough to pay the balance in full. At that time you shall also disclose to all my heirs, the De Booms as well as the De Laurencels, the state of my succession, and the manner in which you intend, either immediately or later, to place them in possession, each for what comes to him; and, if you do not elect a distribution of my succession at the expiration of ten years after my death, after a settlement with the creditors, you will account to and pay over to each of my heirs the revenues as you receive them. Confiding in your fidelity, I leave it to you to distribute either the whole or a part of the capital of my estate among my

heirs, or the revenues only, during twenty years from the date of my death.

In cases of intestacy, there can be no doubt of the proposition, as to real property, that the law of its situation will control: Story on Conflict, section 474, and note. In general, it is held, as to personal property, that the law of the domicil will control, unless there be a local law directing otherwise. But the decedent did not die intestate; he left a will, with instructions, under which will and instructions the trustee holds the property. We must, therefore, look at the will and instructions, holding them, as it were, by the four corners, to see if we can ascertain his intentions. He made "all my heirs, the De Booms as well as the Laurencels," the recipients of the proposed bounty. We are of opinion that when the testator said his property was to go to all his heirs, the De Booms as well as the Laurencels, he did not mean in the proportions directed by the law of his domicil, nor according to the law of succession in this state in cases of intestacy, but he said, in effect, "the De Booms and Laurencels are my heirs, and I wish them to have my bounty." The words "all my heirs" are not to be taken in this case solely as meaning those who take in case of intestacy, but are to be considered in their relation to the words "the De Booms as well as the Laurencels." The testator did not mean that all persons named De Boom or Laurencel should take; but that the persons of either name who stood in an inheritable relation to him should take. Both families did stand in that relation, and so standing and being thus grouped, the principle comes in that where a class is named as devisees, all of that class shall share, and shall share equally. In this view, we think the language used by the testator is clear, and expressed the intention that the relatives named in the record shall take equally.

Order affirmed.

THORNTON, J., and MORRISON, C. J., concurred.

No. 9,979.

LEWIS, EXECUTRIX, ETC. *v.* ADAMS.

Department One. Filed August 24, 1885.

ORDER GRANTING NEW TRIAL—INTENDMENTS IN FAVOR OF ON APPEAL.—On an appeal from an order granting a new trial the appellant must make it affirmatively appear that error, or abuse of discretion, has been committed in granting the order. Neither will be presumed. Every intendment is in favor of the order, and unless that is overcome by something in the record of the case upon which the order was made, or unless it has been made upon some proposition, which, considered in itself, is prejudicially erroneous, the order must be affirmed.

FOREIGN EXECUTRIX CANNOT MAINTAIN ACTION IN THIS STATE.—Under section 1,913 of the code of civil procedure, a foreign executrix cannot maintain an action in the courts of this state, without first obtaining ancillary letters of administration or testamentary.

STATUTE OF LIMITATIONS AS DEFENSE—FINDINGS MUST INCLUDE.—Where an answer sets up the statute of limitations as a defense, a finding that "all the allegations of the plaintiff's complaint are true and correct," is not a findings on the issue of the statute of limitations.

APPEAL from a order of the superior court of Los Angeles county, granting the defendant a new trial. The opinion states the facts.

Victor Montgomery and *Smith, Brown & Hutton*, for the appellant.

Thom & Stephens, for the respondent.

MCKEE, J. Appeal from an order granting a new trial.

It is axiomatic in law, that on such an appeal the appellant must make it affirmatively appear that error, or abuse of discretion, has been committed in granting the order. Neither will be presumed. Every intendment is in favor of the order, and unless that is overcome by something in the record of the case upon which the order was made, or unless it has been made upon some proposition, which, considered in itself, is prejudicially erroneous, the order must be affirmed.

There is nothing in the record to overcome the presumption in favor of the correctness of the order. On the contrary, the record makes the presumption conclusive.

The suit was on a judgment. From the original complaint, it appears that the plaintiff was duly appointed by the probate court of Bexar county, in the state of Texas, executrix of the will of Nat Lewis, deceased; and, in that capacity, she recovered, in the district court of said county and state, on the fifteenth day of March, 1877, a judgment for twelve thousand nine hundred and forty-two dollars, and costs, against the defendant, P. T. Adams. On that alleged judgment the executrix brought suit in the superior court of Los Angeles county, in this state, against the said Adams, without first obtaining ancillary letters of administration. The suit was commenced on the fifteenth of February, 1882. On the eighth of July, 1884—more than five years after the date of the judgment—the plaintiff, by leave of the court, amended her complaint by inserting after the word "Adams," in the title of the cause, the names of Joseph Collins, John H. Kennedy and James A. Dalyrample, and by striking out the word "defendant" wherever it occurs in the complaint, and inserting instead thereof, the word "defendants"—thus alleging a judgment against P. T. Adams, Joseph Collins, John H. Kennedy and James A. Dalyrample, jointly.

Adams, by demurrer and answer, resisted recovery on the judgment, on the grounds of: 1. Incapacity of the plaintiff to sue. 2. *Nul tiel record*. 3. Bar of the statute of limitations.

On the trial the judgment record given in evidence against defendant's exception showed that the plaintiff, as executrix of the will of Nat Lewis, deceased, on the fifteenth of March, 1877, in the district court of Bexar county, state of Texas, in an action against Adams, Collins & Co., on a partnership liability, recovered judgment for twelve thousand nine hundred and forty-two dollars, and costs, against P. T. Adams, Joseph Collins, James Dalyrample and John H. Kennedy. Adams then proved that he had continuously resided in the state of California since July, 1877, except during a period of about two weeks, when he was absent from the state.

On this evidence the court found: "All the allegations of the plaintiff's complaint, as amended, are true and correct;" did not find upon the issue of the statute of limitations; decided that the plaintiff was entitled to recover against defendant Adams the amount of the judgment, and entered judgment accordingly.

The decision and judgment were erroneous, because:

1. The plaintiff, as a foreign executrix, could not maintain an action in the courts of this state without first obtaining ancillary letters of administration or testamentary. Section 1,913, code of civil procedure, declares: "* * * That the authority of * * * an executor or administrator does not extend beyond the jurisdiction of the government under which he was invested with authority." The official character of the plaintiff was derived from the letters granted to her in the state of Texas, and as it was confined to the limits of the state it was not recognizable in California; therefore, she could not, in that capacity, maintain an action here. If it became necessary for her to sue in this state to recover a debt due to the estate which she was administering in Texas, her first step was to obtain letters of administration from the proper court in this state, by subjecting herself to the regulations prescribed by the laws of the state. Otherwise her official character cannot be recognized by the court, and she has no capacity to sue in the courts of the state.

2. The court should have found on the issue of the statute of limitations.

The decision and judgment were therefore properly vacated.

Order affirmed.

ROSS, J., concurred.

MCKINSTRY, J. I concur in the judgment on the second ground stated in the opinion of Mr. Justice McKee.

No. 9,906.

GRANGER *v.* BOURN.

Department Two. Filed August 25, 1885.

GUARANTY—FAILURE OF CONSIDERATION—CORPORATION.—A guaranty, founded on an alleged agreement executed by the officers of a corporation, which they had no authority to execute, is without consideration.

APPEAL from a judgment of the superior court of Nevada county, entered in favor of the plaintiff, and from an order denying the defendant a new trial.

Walling & Gaylord and *A. W. Thompson*, for the appellant.

Cross & Simonds, for the respondent.

THE COURT. If the original E. M. and M. Co. had agreed, as a portion of the consideration of the conveyance to it by Bourn of the property conveyed, that it assumed and would pay all debts which he had contracted in and about the affairs of the mine, doubtless

such agreement would have authorized the officers of the corporation to assume and agree to pay such debts; and its obligation to that end being binding upon it, a discharge of Bourn by creditors from liability on such debts would have been founded upon a consideration. But, in the case before us, the alleged guaranty, signed by plaintiff, and the receipt by Watt, were without consideration, because they were founded on an alleged agreement executed by the officers of the corporation which they had no authority to execute; therefore, the plaintiff received no consideration. He received a piece of paper on which was written, so far as one thousand one hundred and fifty dollars thereof was concerned, a promise to pay, which promise he, as well as the officers who signed it, were in law presumed to know was of no validity as against the corporation. Such being the case, the receipt and the guaranty constituted no defense to the action on the agreement in suit, and the plaintiff was entitled to recover.

Judgment and order affirmed.

No. 9,986.

LYONS ET AL v. STATE OF CALIFORNIA.

Department One. Filed August 25, 1885.

ALIEN, WHO IS—MAY INHERIT PROPERTY.—A person born in Ireland, who has always resided there, and never been in the United States, is an alien, and as such is entitled to inherit property in this state.

THE SAME—NEED NOT COME IN PERSON TO CLAIM PROPERTY.—Under sections 672 and 1,404 of the civil code, and 1,272 of the code of civil procedure, a non-resident alien can take property in this state by succession, although he does not come here in person to claim the same.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the plaintiff. The opinion states the facts.

S. P. Scaniker, for the appellant.

Henry Perry, for the respondent.

BELCHER, C. C. John Guilford, a resident of Alameda county, died in that county intestate in December, 1876, leaving real and personal property, but no heirs, in this state. The public administrator of the county was appointed administrator of the estate and took possession of all its property.

In 1879, the attorney-general, in pursuance of the provisions of section 1,269 of the code of civil procedure, filed an information on behalf of the state in the proper district court, in which he set forth all the facts required by that section and prayed for a judgment of the court that the state be seized of the property of the estate.

Summons was issued on the information and served on the administrator of the estate and the county treasurer of Alameda county, and an order was made and published as required by law.

On this evidence the court found: "All the allegations of the plaintiff's complaint, as amended, are true and correct;" did not find upon the issue of the statute of limitations; decided that the plaintiff was entitled to recover against defendant Adams the amount of the judgment, and entered judgment accordingly.

The decision and judgment were erroneous, because:

1. The plaintiff, as a foreign executrix, could not maintain an action in the courts of this state without first obtaining ancillary letters of administration or testamentary. Section 1,913, code of civil procedure, declares: "* * * That the authority of * * * an executor or administrator does not extend beyond the jurisdiction of the government under which he was invested with authority." The official character of the plaintiff was derived from the letters granted to her in the state of Texas, and as it was confined to the limits of the state it was not recognizable in California; therefore, she could not, in that capacity, maintain an action here. If it became necessary for her to sue in this state to recover a debt due to the estate which she was administering in Texas, her first step was to obtain letters of administration from the proper court in this state, by subjecting herself to the regulations prescribed by the laws of the state. Otherwise her official character cannot be recognized by the court, and she has no capacity to sue in the courts of the state.

2. The court should have found on the issue of the statute of limitations.

The decision and judgment were therefore properly vacated.

Order affirmed.

ROSS, J., concurred.

MCKINSTRY, J. I concur in the judgment on the second ground stated in the opinion of Mr. Justice McKee.

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Department Two. Filed August 25, 1885.

GUARANTY—FAILURE OF CONSIDERATION—CORPORATION.—A guaranty, founded on an alleged agreement executed by the officers of a corporation, which they had no authority to execute, is without consideration.

APPEAL from a judgment of the superior court of Nevada county, entered in favor of the plaintiff, and from an order denying the defendant a new trial.

Walling & Gaylord and *A. W. Thompson*, for the appellant.

Cross & Simonds, for the respondent.

THE COURT. If the original E. M. and M. Co. had agreed, as a portion of the consideration of the conveyance to it by Bourn of the property conveyed, that it assumed and would pay all debts which he had contracted in and about the affairs of the mine, doubtless

such agreement would have authorized the officers of the corporation to assume and agree to pay such debts; and its obligation to that end being binding upon it, a discharge of Bourn by creditors from liability on such debts would have been founded upon a consideration. But, in the case before us, the alleged guaranty, signed by plaintiff, and the receipt by Watt, were without consideration, because they were founded on an alleged agreement executed by the officers of the corporation which they had no authority to execute; therefore, the plaintiff received no consideration. He received a piece of paper on which was written, so far as one thousand one hundred and fifty dollars thereof was concerned, a promise to pay, which promise he, as well as the officers who signed it, were in law presumed to know was of no validity as against the corporation. Such being the case, the receipt and the guaranty constituted no defense to the action on the agreement in suit, and the plaintiff was entitled to recover.

Judgment and order affirmed.

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THE SAME—NEED NOT COME IN PERSON TO CLAIM PROPERTY.—Under sections 672 and 1,404 of the civil code, and 1,272 of the code of civil procedure, a non-resident alien can take property in this state by succession, although he does not come here in person to claim the same.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the plaintiff. The opinion states the facts.

S. P. Scaniker, for the appellant.

Henry Perry, for the respondent.

BELCHER, C. C. John Guilford, a resident of Alameda county, died in that county intestate in December, 1876, leaving real and personal property, but no heirs, in this state. The public administrator of the county was appointed administrator of the estate and took possession of all its property.

In 1879, the attorney-general, in pursuance of the provisions of section 1,269 of the code of civil procedure, filed an information on behalf of the state in the proper district court, in which he set forth all the facts required by that section and prayed for a judgment of the court that the state be seized of the property of the estate.

Summons was issued on the information and served on the administrator of the estate and the county treasurer of Alameda county, and an order was made and published as required by law.

The administrator and county treasurer appeared and filed answers, admitting all the allegations of the information to be true. No one else appeared, and thereupon judgment was rendered that the state be seized of the lands and tenements in the information claimed.

This proceeding was commenced in the superior court of Sacramento county, under the provisions of section 1,272 of the code of civil procedure. In their petition, the petitioners described themselves as all residents of the county of Dublin, Ireland, and allege that they are the heirs at law, and only heirs of John Guilford, deceased, and that they had no notice, actual or constructive, of the proceedings under the information. The petition was signed by the petitioners by their attorney in fact and attorney at law, and was served on the attorney general, who appeared and answered thereto, by a general denial. The case was tried by the court, and judgment rendered in favor of the petitioners. From that judgment this appeal is taken.

It is now claimed on behalf of the state, that the judgment was wrong, and should be reversed, because the petitioners were residents of Ireland, and, therefore, were not permitted, under our constitution and laws, to take property by succession. Section 671 of the civil code, provides that "any person, whether citizen or alien, may take, hold and dispose of property, real or personal, within this state," but it is insisted that the petitioners were neither citizens nor aliens, and, therefore, not within its provisions. The word "alien," it is said, means a person who was born in another country, and has come to this country, and is here residing, either permanently or temporarily; in the one case being a resident alien, and in the other, a non resident alien.

This position cannot be maintained. According to Webster, the word alien, means "a foreigner, one born in or belonging to another country. * * * In American law, one born out of the jurisdiction of the United States, and not naturalized;" and the word foreigner, "A person belonging to a foreign country, or without the country or jurisdiction under consideration."

In Dawson's Lessee v. Godfrey, 4 Cranch, 321, it was held that a person who was born in England, and always resided there, and was never in the United States, was an alien. See also Jones *et al.* v. McMasters, 20 How., 8.

It is next claimed that under section 17 of article i., of the constitution of the state, only those foreigners who are *bona fide* residents of this state can inherit property here, and that all the provisions of the codes, which give the right to inherit to foreigners who are not *bona fide* residents, are inconsistent with the provisions of that section, and are repealed by section 1 of article xxii., of the constitution.

A sufficient answer to this, is found in the fact that in two well considered cases, this court has held otherwise, and we are satisfied with those decisions: People v. Rogers, 13 Cal., 159; Estate of Billings, 3 W. C. R., 774; see also Purezess v. Smidt, 21 Iowa, 540.

It is also earnestly insisted that no non resident alien can take property in this state by succession, unless he comes here in person to claim the same, and that the petitioners failed to do that, and, therefore, their judgment must be reversed.

The civil code provides as follows: "Section 672: If a non resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property, in such case, is disposed of as provided in title viii., part iii., code of civil procedure."

"Section 1,404: Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no non resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession."

Title viii., part iii., of the code of civil procedure, relates to escheated estates, and section 1,272 provides: "Within twenty years after judgment in any proceeding had under this title, a person, not a party or privy to such proceeding, may file a petition in the superior court of the county of Sacramento, showing his claim or right to the property or the proceeds thereof. * * * * All persons who fail to appear and file their petitions within the time limited, are forever barred; saving, however, to infants, married women and persons of unsound mind, or persons beyond the limits of the United States, the right to appear and file their petitions at any time within the time limited, or five years after their respective disabilities cease."

There is nothing in the record to show that this point was made in the court below, or that the petitioners did not appear in person, except the fact that they describe themselves in their petition as "all residing in the county of Dublin, Ireland," and the further fact that the petition is signed by their attorney in fact and attorney at law.

But, assuming that they did not come to this state in person to file their petition and claim the property, was it necessary that they should?

We do not think it was. The general rule is that parties, whether plaintiff or defendant, resident or non resident, may appear in court to claim their supposed rights either in person or by attorney. The plaintiff appears when he files his complaint subscribed by himself or his attorney. The defendant appears when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. Either party may appear in an action though he be not and never was in this state. Why should the word "appear," as used in the above quoted sections of the codes, have any other or different meaning than that ordinarily given to it? We cannot doubt that if the *legislature* had intended to say that no non-resident alien could

claim any property in this state by succession unless he came here in person to make his claim, it would have used other language, showing clearly its meaning.

The last point made is that, under section 4 of article ix. of the constitution, upon the death of Guilford, all his property vested *eo instanti* and absolutely in the state for the benefit of the school fund, and that it cannot be taken therefrom.

That section provides that "all estates of deceased persons who may have died without leaving a will or heir * * * shall be and remain a perpetual fund, the interest of which, together with all the rents of the unsold lands * * * shall be inviolably appropriated to the support of common schools throughout the state."

The fault in the argument is that Guilford did not die without heirs. The petitioners were his heirs, and the property of his estate vested in them, subject to be divested if they did not appear and claim it within the time and in the manner provided by statute.

The case of State v. Reder, 5 Neb., 203, is not in point. In that case the deceased left no heirs, and his estate was held to have vested absolutely and wholly in the state. Under a constitutional provision similar to ours, the proceeds of the estate were placed in the school fund, and the legislature had attempted to divert them to other objects, but the court said the act "is a mere nullity, and confers upon the trustees therein named no rights or power over the estate."

We think the judgment should be affirmed.

SEARLS, C., and FOOTE C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

No. 9,746.

GILMORE *v.* AMERICAN CENTRAL INSURANCE COMPANY.

Department Two. Filed August 25, 1885.

FINAL JUDGMENT IN PURSUANCE TO STIPULATION.—Under the stipulation which is recited in the prior opinion of the court, reported in 1 West Coast Rep., 872, *held*, that the judgment in the present case was properly entered; that the judgment in the Lycoming case became final in the sense of the stipulation, when the time to move for a new trial and to appeal therefrom had elapsed and no motion was made and no appeal taken; that after such judgment became final the plaintiff had a right, under the stipulation, to take judgment in the present case, without amending her complaint.

APPEAL from a judgment of the superior court of Los Angeles county, entered in favor of the plaintiff, and from an order refusing to set it aside. The opinion states the facts.

Gray & Haven, *T. C. Van Ness*, and *W. P. Gardner*, for the appellant.

Wells, Van Dyke & Lee, for the respondent.

BELCHER, C. C. This is the second appeal in this case. Upon the first appeal it was held that the judgment was prematurely entered and it was therefore reversed.

That judgment was entered upon the stipulation which is recited in the opinion of the court: 1 W. C. R., 872; and the judgment now appealed from was entered upon the same stipulation.

It is now claimed that the stipulation had become *functus officio* and did not authorize the entry.

It appears that the Lycoming case, referred to in the stipulation, and this case, had been commenced upon fire insurance policies which were issued by the defendant companies upon the same property and were substantially alike. Demurrers had been interposed to the complaints and overruled and answers filed. The cases were called for trial on the same day, and thereupon, "both parties consenting in open court that the issues in this cause are identical with those of the other action," the stipulation was made and entered in the minutes of the court.

By the stipulation it was agreed that "all proceedings herein shall be stayed until final judgment and decision" in the Lycoming case, "and in case of an appeal in said last named action, then such proceedings are stayed until the final determination of such appeal; and upon such final determination, judgment and decision" of the Lycoming case "either party, without notice, shall and may cause to be entered a judgment in this action corresponding to and like the said final judgment."

The Lycoming case was then tried and judgment rendered in favor of the plaintiff.

An appeal from that judgment was taken, and it was reversed upon the ground that the demurrer to the complaint should have been sustained, because, a copy of the policy being attached to the complaint, the application therefor, which was referred to and made a part of the policy, was neither set forth in the complaint nor its contents alleged: Gilmore v. Lycoming Fire Insurance Company, 55 Cal., 123.

On the going down of the remittitur the plaintiff amended her complaint by attaching thereto a copy of her application for the policy. The defendant amended its answer, but no substantial change was made in the issues to be tried. The case was then tried and judgment was again rendered in favor of the plaintiff. After that judgment had become final the defendant moved the court to change its ruling upon the demurrer in this case, and the motion was set down for hearing at a future day. Before the day arrived, the plaintiff, without notice, moved the court for judgment in pursuance of the stipulation, and her motion was granted. The appeal here is from that judgment and an order refusing to set it aside.

We see nothing in this of which the defendant can be heard to complain.

When the stipulation was made the cases were in every material respect alike. They were based upon like policies, involved the same

amount of money, and had the same attorneys both for plaintiff and defendant.

That being so, it was not thought necessary or advisable to go to the expense of trying both of them, as a final judgment in one would determine the real merits of the other. It was, however, contemplated that an appeal might be taken in the case tried, and that for the possible error in overruling the demurrer, or for other errors afterwards committed, the judgment might be reversed. It must, also, have been contemplated that, in case of a reversal, amendments might be made and a new trial had. The stipulation, in effect, provided that while all this was being done in the Lycoming case, and until a final judgment should be reached in that case, this case should remain in abeyance; but that when the judgment should become final in that case, then a like judgment might be entered, without notice, in this case.

The judgment appealed from in the Lycoming case was not final, within the meaning of the stipulation, and the stipulation did not become *functus officio* when that judgment was reversed.

Nor was it necessary to amend the complaint in this case as it was amended in that. The amendment was but a means to obtain a trial upon the merits, and the judgment thereafter obtained became final only, in the sense of the stipulation, when the time to move for a new trial and to appeal therefrom had elapsed and no motion was made and no appeal taken. Then the plaintiff became entitled to the judgment which she took in this case.

In our opinion, the judgment and order should be affirmed.

FOOTE, C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Nos. 9,888; 11,059.

GREEHN ET AL. *v.* MARKER ET AL.

Department One. Filed August 25, 1885.

NEW TRIAL—DISMISSAL OF MOTION—LACK OF DILIGENCE IN PROSECUTING.—Defendants, on May 26, 1884, filed with the clerk a statement on motion for a new trial. The statement thus filed, was not settled, allowed or certified, and, on October 4, 1884, the court, on motion of plaintiffs, dismissed the proceedings on motion for new trial, for want of diligence in prosecuting it. On December 3, 1884, the defendants, without notice to the plaintiffs, moved the court to set aside the order of October 4, 1884. *Held*, that such motion was properly denied.

APPEAL from a judgment of the superior court of Lassen county, entered in favor of the plaintiff, and from an order denying defendant's motion to vacate an order dismissing his motion for a new trial. The opinion states the facts.

John F. Alexander, for the appellants.

E. V. Spencer, for the respondents.

SEARLS, C. This is an action by plaintiffs, as copartners, for goods, wares and merchandise, sold and delivered to defendants.

Plaintiffs had judgment.

Defendant, Marker, moved for a new trial, and on the twenty-sixth day of May, 1884, filed, with the clerk, a statement on such motion.

The statement thus filed, was not settled, allowed or certified, and on the fourth day of October, 1884, the court, on motion of plaintiffs, dismissed the proceedings on motion for new trial, on the ground that said proceedings had not been prosecuted with due diligence as required by law. Defendant, Marker, on the third day of December, 1884, moved the court to set aside the order of October 4, 1884, dismissing his proceedings for new trial, which motion was denied. Two appeals are prosecuted in the case, one from the final judgment, based on the judgment roll alone, and the other from the order of December 3, denying the motion of defendants to vacate and set aside the order of the court of October 4, 1884, dismissing the proceedings for new trial. This last appeal was taken January 22, 1885, and, by stipulation of counsel, the two appeals are consolidated and submitted as one case. No notice was given to counsel for plaintiffs of the motion to set aside the order of October 4, 1884, and one of the grounds specified in the order of refusal appealed from, is the want of such notice.

Under such circumstances, the action of the court below was eminently proper, and any other course would have been erroneous.

Upon the question, whether or not the order was an appealable one, we express no opinion.

There is no error apparent in the judgment roll

We are, therefore, of opinion that the judgment and order appealed from should be affirmed.

FOOTE, C. and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 20,068.

PEOPLE v. MUNN.

In Bank. Filed August 26, 1885.

CRIMINAL LAW—MURDER—INSTRUCTIONS NOT BASED ON EVIDENCE.—In a prosecution for murder, the refusal of the court to give instructions relating to self-defense, and to homicide committed by accident or misfortune upon a sudden combat, is not error, if there is no evidence upon which such a defense can rest.

THE SAME—EVIDENCE OF CHARACTER OF DECEASED INADMISSIBLE.—In such prosecution the defense cannot give evidence of the character of the deceased for peace and quietness.

THE SAME—EXPERT TESTIMONY—BLOW STRUCK BY FIST.—Where the theory of the prosecution is that death resulted from a blow struck by the fist of the defendant, a medical expert can testify, whether in his opinion, the fracture of the head of the deceased could have been produced by a blow from a man's fist.

APPEAL from a judgment of the superior court of Stanislaus county, entered upon a verdict convicting the defendant of manslaughter, and from an order denying him a new trial. The defendant asked the court to instruct the jury on the law of self-defense, and as to homicide committed by accident or misfortune upon a sudden combat. The request was refused for the reason that there was no evidence upon which such defense could rest. The defendant also offered evidence as to the character of the deceased for peace and quietness. Such evidence was excluded. A witness for the prosecution was asked, against the defendant's objection, whether, in his opinion, the fracture of the decedent's skull could have been produced by a man's fist. He answered, "I think it very probable." The other facts and circumstances surrounding the killing are stated in the opinion on a prior appeal, reported in 2 West Coast Rep., 745.

Wright & Hazen, for the appellant.

E. C. Marshall, attorney general, for the respondent.

THE COURT. In this cause we have considered the points made on behalf of defendant, and find no error in the rulings of the court in regard to any one of them.

Judgment and order affirmed.

No. 20,066.

PEOPLE *v.* MCGINN.

In Bank. Filed August 26, 1885.

CRIMINAL LAW—ORDER GRANTING NEW TRIAL—APPEAL.—An order granting a defendant a new trial, in a criminal case, will not be disturbed on appeal, unless the prosecution makes a very plain showing.

APPEAL from an order of the superior court of Sierra county granting the defendant a new trial.

E. C. Marshall, attorney general, for the appellant.

Hundley & Gale, for the respondent.

THE COURT. The defendant having been convicted of the crime of grand larceny, was granted a new trial by the court before which he was tried. It would require a very plain case on the part of the prosecution to justify us in disturbing the order. An examination of the record satisfies us that we ought not to do so in this case.

Order affirmed.

No. 11,026.

CLANTON v. COWARD.

Department Two. Filed August 26, 1885.

EXCESSIVE VERDICT—COURT MAY REMIT EXCESS.—Where a verdict is rendered for an amount in excess of that demanded in the complaint, the court has power, before the entry of judgment, to permit the plaintiff to remit the excess, and to take judgment for the amount demanded.

PROMISSORY NOTE—ACTION BY ACCOMMODATION MAKER—ALLEGATION OF COMPLAINT—REQUEST—DEMAND.—In an action by an accommodation maker of a promissory note, who signed the same as surety only, to recover the amount paid by him to the payee, the plaintiff need not allege or prove that he paid the note at the request of the defendant, for whose accommodation it was made. Upon such payment being made, the law casts a liability for repayment upon the defendant, and raises an implied promise on his part to reimburse the plaintiff; and suit brought is a sufficient demand.

AN AFFIDAVIT CANNOT BE CONSIDERED ON APPEAL, if it be not contained in the statement or bill of exceptions.

WHERE THERE IS A SUBSTANTIAL CONFLICT IN THE EVIDENCE upon every point essential to a recovery the verdict will not be disturbed because not sustained by the evidence.

APPEAL from a judgment of the superior court of Yolo county, entered in favor of the plaintiff and from orders denying the defendant a new trial, and refusing to set aside the verdict. The opinion states the facts.

Hudson Grant and *R. Clark*, for the appellant.

Harding & Goin, for the respondent.

SEARLS, C. Action on a promissory note made by plaintiff and defendant. Plaintiff had verdict and judgment.

The promissory note in question was joint and several in form, and made by plaintiff and defendant to one A. D. Porter for four thousand five hundred dollars and interest, which sum of money was borrowed from Porter and used in the purchase of a marble yard, the deed for which was taken in the name of defendant.

Plaintiff and defendant were engaged as partners in buying and selling real estate in Yolo county, the former furnishing capital and the latter rendering services in the business of the firm, keeping or causing to be kept, the books of account of the partnership transactions.

The theory of plaintiff is that the purchase of the marble yard was an individual transaction on the part of defendant, having no connection with the partnership affairs, and that in joining with defendant in making the note in suit, he did so merely to accomodate defendant, who received the money borrowed to his own use, and that he, plaintiff, having paid the note, he is entitled to recover the amount so paid with interest.

Defendant, on the other hand, contends that the purchase of the marble yard was a partnership venture, and that the money was borrowed and used and the note given for partnership purposes. Plaintiff, in his complaint, demands judgment for the amount by him paid on the note, viz., four thousand six hundred and fifty dollars.

The jury rendered a verdict in favor of plaintiff for four thousand nine hundred and seventy-two dollars—being three hundred and twenty-two dollars in excess of the sum demanded in the complaint. Plaintiff remitted the excess and took judgment for the four thousand six hundred and fifty dollars.

After the entry of judgment, defendant moved to set aside the verdict on the ground that it is not within the issues, is inconsistent with the same and in excess of plaintiff's demand, which motion was denied, and the appeal is from final judgment, from an order denying a motion for a new trial and from the order refusing to set aside the verdict.

The first point made by appellant is, that "the verdict is not sustained by the evidence."

There was a substantial conflict in the evidence on every point essential to a recovery and upon principle so well settled as not to require reference to the large number of cases in which the doctrine has been held, we are not at liberty to interfere with the verdict of the jury on that ground.

The second point is, that "the court should have set aside the verdict on defendant's motion, because the same was outside of the issues made by the pleadings, and should have ordered an accounting."

It appears in the record that plaintiff was permitted by the court to remit from the verdict the excess over and above the amount demanded in the complaint, and that this action was excepted to by appellant.

We think the course pursued was not without warrant.

The court may disregard the action of a jury in finding as to facts not put in issue by the pleadings: Pierce v. Shaden, 62 Cal., 285.

Had the judgment been entered for the amount of the verdict it would have been cause for granting a new trial, but even then the court might have denied the motion, on condition that plaintiff remit the excess: Chapin v. Bourne, 8 Cal., 294; Harrison v. Peabody, 34 Cal., 178; Dreyfous v. Adams, 48 Cal., 13; Orr v. Hopkins, 1 West Coast Rep., 157.

What the court could do in this respect on motion for new trial it could do on motion of plaintiff before the entry of judgment.

It was not necessary for the plaintiff to aver in his complaint or prove that he paid the note at the request of defendant.

It is a sufficient answer to this, to say that the complaint avers that the plaintiff signed the note as surety only, and for the accommodation of the defendant.

By these words the request was sufficiently averred.

Upon such payment being made, if the note was given as evidence of a debt due from defendant to the payee, the law casts a liability for repayment upon defendant, and raises an implied promise on his part to reimburse plaintiff; and suit brought was a sufficient demand.

The authorities cited by the learned counsel for appellant from 2 Greenleaf on Ev., secs. 113, 114, relate to cases where a party pays, lays out and expends money for the benefit of another, without being legally bound so to do, in which cases a request must be averred.

No order for an accounting was proper in the case.

The answer is not framed with any such view, and defendant does not ask for an accounting therein. Defendant claimed the note to be a partnership liability. If correct in this, he was entitled to a verdict. But the jury found against him on the issue, as they did also on the defense of accord and satisfaction.

The affidavit purporting to be that of G. W. Hutchins, foreman of the jury who tried the cause, cannot be considered, as it forms no part of the record, not having been embodied in any statement or bill of exceptions.

The judgment of the court below and the orders denying the motion for new trial and refusing to set aside the verdict should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

No. 11,032.

SCHEERER v. EDGAR, AUDITOR, ETC.

In Bank. Filed August 26, 1885.

MANDAMUS AGAINST COUNTY AUDITOR—UNDERTAKING ON APPEAL BY DEFENDANT MAY BE DISPENSED WITH.—In proceedings for a writ of mandate against a county auditor, to compel him to issue a warrant upon the county treasurer, for the payment of a certain sum of money, the defendant does not act in his individual capacity; and in an appeal by him to the supreme court, the court may, under section 946 of the code of civil procedure, dispense with an undertaking on appeal.

NOTICE to dismiss an appeal from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

John L. Love, for the appellant.

E. A. & G. E. Lawrence, for the respondent.

ROSS, J. This is an appeal taken by the defendant from a judgment of the superior court directing a writ of mandate to issue, compelling the defendant, as auditor of the city and county of San Francisco, to issue to the plaintiff a warrant upon the treasurer of the city and county, for the payment of a certain sum of money. The court below, by an order made, dispensed with an undertaking on appeal on the part of the appellant, by virtue of that portion of section 946 of the code of civil procedure, which provides that "the court below may, in its discretion, dispense with, or limit, the security required by this chapter, when the appellant is an executor, administrator, trustee or other person acting in another's right."

In taking the appeal, the defendant was not acting in his individual capacity, for, in that capacity, he was not a party to the proceeding. He was proceeded against in his official capacity as auditor; it was against him as auditor, that the judgment went in the court below, and in that capacity only, could he appeal. He was not acting, therefore, in his own individual right, but in that of the city and county. The case, therefore, falls within the provisions of the code of procedure cited, and the motion to dismiss the appeal is, therefore, denied.

McKINSTRY, J., MORRISON, C. J., THORNTON, J., MYRICK, J., and McKEE, J., concurred.

No. 9,534.

COOK *v.* LION FIRE INSURANCE COMPANY.

Department One. Filed August 26, 1885.

BILL OF SALE—MORTGAGE—PRE-EXISTING DEBT—DISCHARGE OF INDEBTEDNESS.—In determining whether a bill of sale of personal property, based upon a previously existing debt, was absolute, or intended merely as a mortgage, the question to be settled, is, whether the intention of the parties was to cancel the debt, or to secure it; this is a question of fact to be determined by the negotiations had at the time, and the subsequent acts of the parties. In determining this question, a person who was present at the time the bill of sale was made, may testify to what he knew of the transaction.

THE SAME—INSURANCE—REAL OWNER OF PROPERTY INSURED.—At the time of the making of the bill of sale in question, plaintiff's vendor was indebted to him, and was desirous of obtaining more money. He, thereupon, offered to sell him a certain fifteen hundred cords of wood, in payment of the money which was due, and was about to be procured. The bill of sale of the wood was accordingly executed, upon such consideration, and the plaintiff immediately took possession, and had it insured in his own name. The application for insurance stated that the plaintiff was the sole owner of the property. Subsequently the plaintiff took another bill of sale for the same wood, from his vendor. At the time of the first bill of sale, it was agreed, in writing, between the parties, that the plaintiff would sell, to his vendor, the wood, if, by a certain date, the latter paid him the sum of one thousand eight hundred dollars. *Held*, that the whole contract was an absolute sale, with the privilege to repurchase reserved to the vendee; that the vendee was the sole owner of the wood, and was not guilty of a breach of warranty in representing himself as such in his application for insurance.

FIRE INSURANCE—AMOUNT OF LOSS—STATEMENT IN PROOF OF LOSS.—In an action against a fire insurance company, to recover the amount of a loss, the assured is not limited to the amount claimed in the proof of loss, if he was induced to execute the same through the false representations of the company's adjuster.

WHEN THE EVIDENCE IS CONFLICTING, the findings will not be disturbed.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

T. C. Van Ness, for the appellant.

A. P. Catlin, for the respondent.

FOOTE, C. This is an action upon a fire insurance policy. The evidence shows that just before the policy was issued, Cook, the plaintiff, had a debtor, one Cardwell; that Cardwell wanted to get some more money from Cook and offered to sell him a certain fifteen hundred cords of wood in payment of the money which had been, and was about to be procured by him; that as a part of this negotiation it was understood that Cook was to insure the wood to be

transferred to him by Cardwell, and for that purpose these two visited one Meredith, who was the agent of the Liverpool, London and Globe Insurance Company, resident at Folsom. Upon stating to this agent the nature of the proposed sale, Cook was advised by him to take a bill of sale from Cardwell of the wood, and further, to take possession of it, as the parties Cook and Cardwell seemed desirous that the transaction should be a sale and not a mortgage. Accordingly, a bill of sale was drawn by the agent, and signed by Cardwell and a formal delivery of possession was taken by Cook and the wood remained at the spot where he took such possession, on the bank of the American river, and he was never after that divested of its possession until it was burned. After this bill of sale and delivery of possession took place and the agent, Meredith, was, by Cook and Cardwell, put in possession of a full knowledge of the title of Cook to the wood and all the facts leading up to and surrounding this sale and delivery, he made out an application addressed to the Liverpool, London and Globe Company for an insurance policy on this property in the sum of four thousand dollars, and Cook signed the same. This application set out what was the understanding of the agent, Cook and Cardwell at that time, viz.: that Cook was the sole owner of the property. It was forwarded to San Francisco, and in due course of mail was received by the Liverpool, London and Globe Company's agent there. The risk was not accepted by that company, but it submitted the application to the Lion Company without any knowledge of it on the part of Cook, and upon this application, thus submitted, the Lion Company issued its policy to Cook, and it was forwarded through the L. L. and G. Co. to Meredith, the latter company's agent at Folsom; Cook at that time was absent and Meredith informed Cardwell of the arrival of the policy and that the premium on it ought to be paid; thereupon Cardwell paid to Meredith for Cook the amount of the premium for the Lion Company, which company received it. This wood was after that time burned, with five hundred other cords of wood which Cook had bought from Cardwell and which was piled near that first purchased. An adjuster was sent up to Folsom after the wood was destroyed by fire, to look into the matter. Neither he nor his company at this time seem to have claimed that the policy thus issued to Cook was void. Their claim appears to have been that he had only a lien upon the wood for the money he had paid Cardwell for it, viz.: the sum of two thousand two hundred and ninety dollars; that he was not the sole owner of the wood, and that his insurable interest amounted in no event to more than the sum above stated. It also appeared that after the insurance policy was issued Cook took a second bill of sale from Cardwell including the one thousand five hundred cords of wood first sold and delivered, and the five hundred last sold, and that at that time five hundred and fifty dollars of the two thousand two hundred and ninety dollars was paid Cardwell; it also appears in evidence that at the time of the first sale it was agreed in writing between Cook and

Cardwell that the former would sell to the latter the fifteen hundred cords of wood if by a certain date Cardwell paid Cook the sum of one thousand eight hundred dollars.

The whole contract in writing between Cook and Cardwell, comprised in both the bill of sale and the agreement contemporaneous with it, was a sale with the privilege to repurchase reserved to the vendor. It was simply in effect this, that Cardwell, upon paying to Cook within a certain time, and that but a brief one, a certain sum of money, might repurchase the property, or, what is the same thing, divest title from Cook, which had by the sale vested in him: Haynie v. Robertson, 58 Ala., 40, and cases there cited; Hickman v. Cantrell, 9 Yerger, 172; Magee v. Catchings, 33 Miss., 673, 693. It was not a mortgage or a pledge: Jones on Chattel Mortgages, sec. 26. In this case the transaction was based, it is true, upon a previously existing debt, and the question to be settled is whether the intention of the parties was to cancel that debt or secure it, and this again, is a question of fact to be determined by the negotiations had at the time, and the subsequent acts of the parties: Jones on Mortgages, sec. 326. Here a debt was paid, and no claim afterwards made for it, the party purchasing expressly declared that he would not take a mortgage but must have a sale of the property to himself. A bill of sale was written and signed, and the property was delivered to the vendee by the seller, and taken possession of by him, and no acts of ownership have since been exercised by the vendor over it, he having the privilege conceded to him, that if he would pay at a certain time a certain price for the property he might purchase it, and that was the full extent of his rights, and the title to the wood vested in Cook: Jones on Mortgages, sec. 326; Hooper v. Bailey, 28 Miss., 328. So that when Cook signed the application which was made out by Meredith, and described himself as the sole owner of the wood, he described his title truthfully, and committed no breach of warranty as to the policy issued by the Lion Insurance Company. The plaintiff did nothing, so far as the application was concerned, to forfeit the policy, even conceding that it was an application which the Lion Company might justly consider as made to itself.

But it is said Cook cannot recover from the Lion Company anything more than the amount claimed in the proof of loss, viz., the sum of two thousand two hundred and ninety dollars. This cannot be so. It sufficiently appears, although on this point the evidence is conflicting, that the insurance adjuster did not deal fairly with Cook, in getting him to sign and swear to the proof of loss, and we do not think the latter should be bound by any such statement. When an adjuster faithfully and fairly obtains an affidavit of loss from one claiming against his company, it is to be commended; but when the contrary appears, as in this case, the party thus entrapped should not be bound by it to his prejudice.

The Lion Company was not deceived by Cook in any way; he stated nothing, that affects his rights, untruthfully to it or its agents,

either verbally or in writing. He is shown to have been the sole owner of the property insured, to have suffered the full amount of the loss as such owner, and through no fault of his.

As to the point made that the question asked Meredith "what he knew of the transaction" as between Cook and Cardwell, was immaterial, we are of opinion that it, and the evidence he gave in answer thereto, were admissible, because it was proper that all the negotiations had at the time the bill of sale was made, and also the subsequent acts of the parties in relation thereto, should be considered in determining the question of fact as to whether the intention of the parties was to cancel the debt or secure it: Jones on Mortgages, sec. 326.

One of the main facts to be determined by the court who tried the case, a jury being waived, was whether the bill of sale represented an absolute sale of the wood, or was executed for security. This was a question to be decided by that tribunal on a preponderance of evidence, as if before a jury: Perkins v. Eckert, 55 Cal., 400-404. The court having determined this question in the affirmative, and a conflict of evidence on the point appearing to exist, the judgment should not be reversed.

Upon the whole case, we are of opinion that the judgment and order denying a new trial should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 20,073.

PEOPLE v. O'NEIL.

In Bank. Filed August 26, 1885.

MURDER IN FIRST DEGREE—ERRONEOUS INSTRUCTIONS WHEN IMMATERIAL.—Where a defendant is convicted of murder in the first degree, an erroneous instruction as to whether a homicide committed without deliberation is murder in the second degree, or manslaughter, is without prejudice to the defendant, and therefore no ground for reversal.

THE SAME—DEFENDANT WITNESS IN OWN BEHALF—INSTRUCTIONS AS TO WEIGHT OF EVIDENCE.—In a prosecution for murder, where the defendant offers himself as a witness in his own behalf, the court may instruct the jury, that, in considering the weight and effect to be given to his evidence, they should consider his relation and the situation under which he gives his testimony, the consequences to him relating from the result of the trial, and all the inducements and temptations which would ordinarily influence a person in his situation.

NEW TRIAL—INSANITY—EVIDENCE.—The evidence of the defendant's insanity, upon which a motion for a new trial was based, considered and held insufficient.

APPEAL from a judgment of the superior court of Sierra county, entered upon a verdict convicting the defendant of murder, and from an order denying him a new trial. The opinion states the facts.

M. Farley, for the appellant.

E. C. Marshall, attorney general, for the respondent.

MORRISON, C. J. The defendant was tried and convicted of the crime of murder in the first degree, and sentenced to be hanged.

The first point made on his behalf on the appeal is, that the court erred in giving the jury the following instruction:

"The unlawful killing must be with the clear intent to take life in order to constitute murder in the first degree. It must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation, for when there is a want of deliberation it is murder in the second degree." The criticism on the foregoing instruction, is on the latter part of it, that is to say, it is claimed that the court erred in telling the jury that "when there is a want of deliberation it is murder in the second degree," as the crime under such circumstances might amount to manslaughter only, and not to murder in the second degree. But conceding for the purpose of the argument, that the instruction was erroneous in the concluding part of it, the defendant was not prejudiced thereby, as the verdict of the jury was for murder in the first degree. It matters not, therefore, in the present case, whether a homicide committed without deliberation is murder in the second degree or manslaughter only: People v. Swift, 5 West Coast Rep., 215.

The next alleged error complained of is, that the court erred in giving the following instruction.

"The defendant has offered himself as a witness on his own behalf on this trial, and in considering the weight and effect to be given his evidence, in addition to noticing his manner and the probability of his statements taken in connection with the evidence in the cause, you should consider his relation and the situation under which he gives his testimony, the consequences to him relating from the result of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation. You should carefully determine the amount of credibility to which he is entitled. If convincing and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it." The foregoing instruction, or one to the same effect, has been considered and approved in several cases, one as early as People v. Cronin, 34 Cal., 195, and another as late as People v. Morrow, 60 Id., 147. But independent of any authoritative decision on the point, we think the instruction correct in principle, as was said by the court in the case of People v. Morrow: "It is only by virtue of a provision of the code that he, the defendant, is permitted to testify at all, and it is manifest that he labors under the strongest temptation to which any witness could be subjected:" 60 Cal., 147.

There is but one other point in the case deserving of notice, and that is that the court should have granted a new trial on the ground of newly discovered evidence. This alleged new evidence consists of letters written by the defendant since the homicide, and a letter written by the sheriff of Sierra county. It is claimed that this evidence tends to establish the insanity of the defendant; and it is true that the defendant's letters are very incoherent, and the sheriff expresses the opinion that the defendant is not insane, but is of weak

mind. We do not think that these letters, by any means, establish the insanity of the defendant, or that they constituted legal ground for granting him a new trial. No evidence was introduced, on the trial, tending to establish the insanity of the defendant, and that question was not properly before the court. The defendant was examined at great length, as a witness in the case, and there is nothing in his evidence to indicate to the court that he was insane, or to make it the duty of the court to try the question of his sanity under section 1,368, of the penal code.

Judgment and order affirmed.

MYRICK, J., THORNTON, J., MCKINSTRY, J., and ROSS, J., concurred.

No. 9,903.

COX v. HAYES.

Department One. Filed August 26, 1885.

EJECTMENT—CONSTRUCTION OF DEEDS—PLAINTIFF MUST RECOVER ON STRENGTH OF HIS OWN TITLE.—In an action of ejectment, the plaintiff must recover upon the strength of his own title; and where both parties claim under a common grantor, a prior deed to the plaintiff cannot be enlarged by a subsequent deed to the defendant.

APPEAL from a judgment of the superior court of Butte county, entered in favor of the defendant.

Reardon & Freer, for the appellant.

I. S. Belcher, for the respondent.

ROSS, J. The only difference between the case as now presented and as presented on the former appeal: 64 Cal., 32; is that on the last trial the plaintiff was permitted, against the objection and exception of the defendant, to put in evidence a deed from Hudson, the common grantor, to the defendant of "the northeast quarter of section sixteen, township seventeen north, range three east, excepting therefrom a certain strip of said quarter section, sold by F. R. and A. O. Larkin to A. W. Campbell, and also the easterly one hundred acres of said quarter section, sold by W. K. Hudson to A. Fraser and Thomas Cox."

It was held on the former appeal that the deed from Hudson to Fraser and Cox conveyed only seventy-seven and seventy-one one-hundredths acres, which excluded the premises in controversy. We know of no principle upon which the former conveyance to the plaintiff can be held enlarged by the subsequent conveyance to the defendant. The circumstance that the deed to the defendant may not have conveyed to him the property in dispute does not aid the plaintiff in this action of ejectment, where the plaintiff must recover on the strength of his own title.

Judgment affirmed.

MCKINSTRY, J., and MCKEE, J., concurred.

No. 9,614.

CAMPBELL ET AL. *v.* J

Department Two. Filed A

PETITION FOR INVOLUNTARY INSOLVENCY HELD SUF

APPEAL from certain orders of the
county, entered in an insolvency procee
solvency was as follows:

[Title of court.]

To the Hon. John Caldwell, superior

The petition of Wilcox & Powers &
ton, McCarthy & Co. (a co-partnership)
Wilhelm and William Campbell, all re
state of California, respectfully shows:

That Jas. F. Judd and M. McDono
name and style of "J. F. Judd," are inc
follows: To Wilcox, Powers & Co., in th
forty-six dollars for goods delivered to
ton, McCarthy & Co., in the sum of four
for goods delivered to them during 1
the sum of six dollars and seventy-five c
them during 1883; to Theodore Wilhelm
dollars and ninety-five cents, for goods delivered to the
1883; to William Campbell, in the sum of two hundred and
one dollars and forty cents for goods delivered to them in 1883.

That all of said debts and demands accrued in this state, and your petitioners further represent: That each of said sums are due and unpaid, and have not been assigned to your petitioners in whole or part. That said Jas. F. Judd and M. McDonough reside in said county, and have permitted their property to remain under attachment for over four days, and that they are insolvent, and have so been, before, and ever since, said attachment was levied on their said property. That the said insolvents have no other property.

Wherefore, your petitioners pray: That this court issue an order to show cause, at a time and place fixed by this court, why the said J. F. Judd and M. McDonough should not be adjudged insolvents, and the surrender of their estates be made for the benefit of their creditors, in the manner required by insolvent debtors.

[Duly verified.]

A. BURROWS,
Attorney for Petitioners.

Chas. W. Kitts, for the appellants.

A. Burrows, for the respondents.

THE COURT. Conceding, without deciding, that the appellant has the right to prosecute this appeal, we are of opinion that the record is without error. The contention here is, that the petition is defective. We have examined it, and are of opinion that it complies with the requirements of the statute, and is sufficient.

Orders affirmed.

Dollars.
No. 188
t National Bank
Y TO THE ORDER OF
$

No. 8,460.

POTTER ET AL. v. ROETH.

Department One. Filed August 26, 1885.

FRAUD—RESCISSION OF CONTRACT—ALLEGATIONS OF COMPLAINT.—In an action to compel the reconveyance of land, the plaintiff must aver his willingness to restore to the defendant the consideration paid by him.

APPEAL from a judgment of the superior court of Alameda county, entered in favor of the plaintiff. This was an action to compel the reconveyance of land, the consideration of the deed being the sale of a half interest in a fruit business, the value of which plaintiffs alleged to be fraudulently overstated. The complaint failed to allege that the sale of the half interest be set aside and that the defendant be restored to the same.

George E. Whitney, for the appellant.

Wm. A. Cornwall, for the respondents.

THE COURT. Upon the principle that he who seeks equity must do equity, the demurrer to the complaint should have been sustained.

Judgment reversed and cause remanded, with directions to the court below to sustain the demurrer.

No. 9,721.

HEDGES ET AL. v. SUPERIOR COURT OF YUBA COUNTY.

In Bank. Filed August 27, 1885.

CONTEMPT—VIOLATION OF INJUNCTION—AFFIDAVIT—CORPORATIONS.—An affidavit on which contempt proceedings were based, for violating an injunction which had been issued and served, restraining a corporation, its officers, agents, superintendents, managers, servants and employees, from the commission of certain acts, did not state that the defendants were officers, agents, etc., of the corporation; it did state that they had full knowledge of the issuance, service and effect of the injunction, that they did the acts complained of in violation thereof, and in contempt of the court issuing it. *Held*, that the affidavit was sufficient.

APPLICATION for a writ of prohibition. The opinion states the facts.

Cross & Simonds, for the petitioner.

E. A. Forbes, *Stabler & Bayne*, *E. A. Davis* and *I. S. Belcher*, for the respondent.

MYRICK, J. Application for a writ prohibiting the respondent from proceeding in the matter of an alleged contempt committed by the petitioners. An injunction had been issued and served, restraining a corporation, its officers, agents, superintendents, managers, servants and employees from the commission of certain acts. The affidavit on which the contempt proceedings were based did not, in terms, state that the petitioners herein were officers, agents, superintendents, managers, servants or employees of the corporation; but it did state that they had full knowledge of the issuance, service

and effect of the injunction, that they worked the mine of the corporation, and that they did the acts complained of in violation of the injunction, and in contempt of the authority of the court issuing it. We cannot presume, for the purposes of issuing the writ prayed for, that the petitioners went upon the ground of the corporation without its authority, and committed a trespass, and worked its mine, "with a high hand;" but, rather, that they went in and worked the mine with the consent and approbation of the owner—that their operations were permitted, if not approved and authorized. Tested by the rules of law as to a writ of prohibition, we think the affidavit sufficient.

Writ denied.

MORRISON, C. J., MCKEE, J., and MCKINSTRY, J., concurred.

No. 9,987

CARRASCO *v.* STATE OF CALIFORNIA.

Department One. Filed August 27, 1885.

NON RESIDENT ALIEN MAY ASSIGN RIGHTS IN INHERITANCE.—A non resident alien may sell his interest in the property of an estate, which he has inherited, and his assignee may appear and claim it, under section 1,272 of the code of civil procedure.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the plaintiff. The opinion states the facts.

S. P. Scaniker, for the appellant.

Page & Eells, for the respondent.

BELCHER, C. C. It appears in this case that one August Leopold Mongard died intestate in Santa Barbara county in 1870. He left surviving him a widow and one minor child, who were both residing in the republic of Chile. His estate was administered in the probate court of Santa Barbara county, and, after paying all claims against it and the expenses of administration, there was left the sum of fourteen hundred and fifty-nine dollars in gold coin. No one appeared to claim this money as heir, and under proceedings commenced by the attorney-general, in pursuance of the provisions of section 1,269, code of civil procedure, it was paid into the state treasury. The property of the estate was common property, and the minor child died, leaving its mother its only heir.

The widow, by an instrument in writing, sold and transferred to Carrasco, the petitioner, all her right to the proceeds of the estate. The petition by Carrasco, under section 1,272, code of civil procedure, that this money be paid over to him, was signed by his attorney in fact and attorneys at law.

The case was tried, the attorney general appearing for the state, and judgment rendered in favor of the petitioner.

From that judgment the appeal is taken.

This case in its main features is the same as the case of Lyons *et al.* v. The State of California, just decided. All the points made in that case are made here, and upon those points nothing more need be said.

It is further claimed in this case, that if the widow of the deceased could have appeared and claimed the proceeds of his estate, her assignee cannot do so, and that his petition therefore states no cause of action.

At common law aliens could not take property by descent or other mere operation of law: Farrell v. Enright, 12 Cal., 450; Lick v. Stockdale, 18 Cal., 218.

We have now changed the rule of the common law in this respect by providing that "any person, whether citizen or alien, may take, hold or dispose of property, real or personal, within this state:" Sec. 671, C. C. We have also provided that the "code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and promote justice:" Sec. 4, C. C.

A non-resident alien may take property by succession, but he must appear and claim it within a given time: Sec. 672, C. C. This as we held in Lyons v. State of California, *supra*, does not mean that he must necessarily appear in person. The manifest object of the provisions of the codes, touching this matter, was to give to non-resident aliens substantially the same rights to the property of a deceased relative, as are secured to resident aliens by the constitution. And these provisions must be liberally construed to effect the object intended.

Ordinarily one who has property, whether it be tangible or a mere right of action, may sell it, and the purchaser will have and may assert the same right to it that the seller had. A resident alien might sell his interest in the property of an estate and the purchaser would be permitted to appear and take that interest. Why should not the non-resident alien and his assignee have the same rights in this respect as the resident alien and his assignee?

The non-resident must "appear and claim" the property, but he does that whether his appearance be in person or by attorney, or by an assignee. To give the word "appear" any other meaning would be evidence that we construe narrowly and not liberally the provisions of the codes.

The judgment we think should be affirmed.

SEARLS, C. and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

No. 11,049.

SMITH v. STROTHER, AUDITOR, ETC.

In Bank. Filed August 27, 1885.

OFFICIAL SHORTHAND REPORTERS—ACT OF MARCH 21, 1885, CONSTITUTIONAL.—The legislature passed an act, approved March 21, 1885, entitled, "an act to amend section 274 of an act entitled, 'an act to establish a civil code of procedure,' relative to the compensation of court reporters," by which it is provided that the official reporter shall receive as compensation for his services a monthly salary, to be fixed by the judge by an order duly entered on the minutes of the court, which salary shall be paid out of the treasury of the county in the same manner and at the same time as the salaries of county officers, with a *proviso* to the effect that such salary shall not exceed three hundred dollars per month in counties having a population of one hundred thousand and over, and shall not exceed two hundred and seventy-five dollars per month in counties having a population less than one hundred thousand and exceeding fifty thousand, and so on to and including counties having a population less than five thousand in which the maximum is fixed at seventy-five dollars per month. The act further provides that "in civil cases in which the testimony is taken down by the official reporter, each party, shall pay a *per diem* of two dollars and fifty cents before judgment or verdict therein is entered, and where the testimony is transcribed the party or parties ordering it shall pay ten cents per folio for such transcription on delivery thereof; said *per diem* and transcription fees to be paid to the clerk of the court, and by him paid into the treasury of the county, and such portion as shall be paid by the prevailing party may be taxed as costs in the case." *Held*, that such act was not unconstitutional; that it was not a delegation of legislative power to the judiciary or in violation of the constitutional provision requiring a uniform system of county governments, or because it imposes a new set of officials upon the people, in contravention of section 6, article xi., of the constitution.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant, in a proceeding to compel him to audit plaintiff's demand as official reporter. The opinion states the facts.

W. M. Pierson and *A. L. Hart, amicus curiae*, for the appellant.

John L. Love, for the respondent.

ROSS, J. The last legislature passed an act, approved March 21, 1885, entitled "An act to amend section 274 of an act entitled 'an act to establish a civil code of procedure,' relative to the compensation of court reporters," by which it is provided that the official reporter shall receive as compensation for his services a monthly salary, to be fixed by the judge, by an order duly entered on the minutes of the court, which salary shall be paid out of the treasury of the county, in the same manner and at the same time as the salaries of county officers, with a *proviso* to the effect that such salary shall not exceed three hundred dollars per month in counties having a population of one hundred thousand and over, and shall not exceed two hundred and seventy-five dollars per month in counties having a population less than one hundred thousand and exceeding fifty thousand, and so on to and including counties having a population less than five thousand, in which the maximum is fixed at seventy-five dollars per month. The act contains other provisions not important to mention, and further provides that "in civil cases in which the testimony is taken down by the official reporter, each party shall pay a *per diem* of two dollars and fifty cents before judgment or verdict therein is entered, and where the testimony is transcribed, the party or parties ordering it shall pay ten cents per folio for such transcription on delivery thereof; said *per diem* and

transcription fees to be paid to the clerk of the court, and by him paid into the treasury of the county, and such portion as shall be paid by the prevailing party may be taxed as costs in the case."

The act is claimed to be violative of the constitution in three respects: First, as "a delegation of legislative power to the judiciary;" second, "in violation of the constitutional provision requiring a uniform system of county governments," and, third, because it imposes a new set of officials upon the people, in contravention of section 6, article xi., of the constitution."

Of course, we have nothing to do with the policy of the law, and it is our duty to sustain it unless we can see clearly that it is in conflict with the paramount law of the state. And this we cannot do. In so far as the right to confer upon the judges the power and duty of fixing the compensation of reporters is concerned, the provisions of the act in question are similar to those of all of the former statutes upon the subject, commencing with the act of May 17, 1861: Statutes 1861, page 497. Immediately prior to the adoption of the codes, the law with respect to phonographic reporters of the courts in San Francisco, was contained in the act of March 13, 1866: Stats. 1865–6, p. 232; and in the act of March 28, 1868: Stats. 1867–8, p. 425. Each of those statutes, as well as the provisions of the code of civil procedure, authorized the judge to fix the compensation of the reporter in certain cases. And in *Ex parte* Reis, 64 Cal., 234, it was said that whether the acts of 1866 and 1868 or the provisions of the code were to control the determination of that case was immaterial, as "in either case, just before the adoption of the present constitution, the district court and county court could legally employ the power of appointing a shorthand reporter, fix his compensation in criminal cases and order such compensation to be paid, and it was the duty of the treasurer to pay the same upon the order of the court." It is true that the point now made was not made in *Ex parte* Reis, nor does the constitutionality of the various statutory provisions conferring upon the courts the power of fixing the compensation of reporters seem ever before to have been raised in this state.

In our opinion, the point is not well taken. Phonographic reporters are officers of the court in the same sense that sheriffs and clerks are. They constitute part of the judicial system of the state. The court may fix the fees of referees, commissioners, keepers, etc., in proper cases—why not of reporters? We see in the act of doing so none of the characteristics of *legislation*. Nor does it in any manner contravene that provision of the constutition requiring the legislature to establish "a uniform system of county governments." Phonographic reporters are not county officers, and have nothing to do with county governments. They are, as already said, officers of the courts, and constitute a part of the judicial system of the state. Nor does the act in question "impose a new set of officials upon the people, in contravention of section 6, of article xi., of the state constitution." The "officials" referred to in the act of March 21,

1885, were already provided for by law. See *Ex parte* Reis, 64 Cal., 233, and the statutes there and herein before referred to.

Section 6, of article xi., of the constitution, cited in support of this point of respondent, reads:

"Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population, of cities and towns; which laws may be altered, amended or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

The framers of the constitution, as we had occasion to say in Staude v. Election Commissioners, 61 Cal., 320, meant something, when they inserted the provision that "cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to, and controlled by, general laws," and we are not at liberty to hold that they did not mean what they said. Giving, as they did, to all cities and towns, and cities and counties, the right to organize under a general act of incorporation, which the legislature was directed to pass, or to continue their existence under their existing charters, as they might elect, they nevertheless said that whichever course should be pursued, such cities and towns, and cities and counties, should be subject to and controlled by general laws—such general laws as should be passed by the legislature, other than those for the "incorporation, organization and classification" of cities and towns. The constitution has provided, in effect, that the city and county of San Francisco shall not be compelled to surrender its present charter for one it does not want; and, further, that its charter shall not be changed by special legislation, directly nor indirectly, under the guise of laws relating to cities, or cities and counties, containing a population of more than one hundred thousand inhabitants. At the same time, recognizing the fact that the city and county of San Francisco remains a subdivision of the state, the constitution has said, in effect, that it, as well as all other cities and towns heretofore, or hereafter, organized, shall be subject to and controlled by such general laws as the legislature shall enact, other than those for the incorporation, organization and classification, in proportion to population of cities and towns.

Judgment reversed and cause remanded, with directions to the court below to overrule the demurrer.

THORNTON, J., and MORRISON, C. J., concurred.

MCKINSTRY, J., CONCURRING. I concur in the judgment, and in the conclusion that the act of March 21, 1885, is valid and operative.

MYRICK, J., dissented.

WEST COAST REPORTER.

WHOLE NO. 89. SEPTEMBER 10, 1885. VOL. VII. NO. 9.

SUPREME COURT OF UTAH.

BROWRING *v.* BROWRING.

Filed August 2, 1885.

MOTION TO DISSOLVE ATTACHMENT—APPEAL—AFFIDAVITS MUST BE IDENTIFIED.—Affidavits used on a motion to dissolve an attachment, are not part of the judgment roll, and will not be considered on appeal, unless embodied in a bill of exceptions, or identified by the clerk.

APPEAL from an order refusing to dissolve an attachment. The opinion states the facts.

Darke & Kenner, for the appellant.

Arthur Brown, for the respondent.

ZANE, C. J. The plaintiff in this case filed his complaint in the office of the clerk of the third district court, and the defendant his answer. The plaintiff also filed an affidavit in which he alleged that defendant was disposing of his property with intent to defraud his creditors. And an attachment writ issued by virtue of which defendant's property was seized. The defendant entered a motion to discharge the attachment for the reason that the charge of fraud was untrue, and presented affidavits in its support, and the plaintiff presented counter affidavits. The motion was overruled by the court and defendant excepted and appealed from the order. The issue determined by the court was one of fact and the evidence consisted of affidavits. In order to determine this issue we must have the evidence before us. Some of the affidavits used on the hearing of the motion in the court below, were copied into the transcript, others were not, and those copied were not identified in the clerk's certificate as the ones used, nor are they found in the bill of exceptions. Except in cases in which default is entered, the judgment roll consists of the pleadings, a copy of the verdict of the jury, or finding of the court or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment. The affidavits were not a part of the judgment roll: Sec. 551, p. 251, Laws Utah, 1884. Sec. 538, p. 249, Ibid, provides that "the judgment roll and the affidavits or bill of exceptions or statement, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing

a new trial, unless the motion be made on the minutes of the court, and in that case the judgment roll and a statement to be subsequently prepared, with a copy of the order, shall constitute the record on appeal." This section applies to records on appeal from judgments granting or overruling motions for new trials.

On appeal from an order granting or refusing a motion to dissolve an attachment, there is no statute making the motion itself or the affidavits a part of the record without a bill of exceptions. But if it were conceded that a bill of exceptions was unnecessary to bring such affidavits before this court we hold that all the evidence heard upon the motion to discharge should be found in the record and if consisting of affidavits, they should also be specified in the certificate of the clerk and identified. In the case of Paine v. Linhill, 10 Cal., 370, the court said: "The practice act, after designating the manner in which statements shall be prepared, expressly excepts appeals, from an order made upon affidavits filed, and provides that the affidavits shall be annexed to the order in place of the statement: Sections 337, 343. All that is required then, in such a case, is, that the certificate of the clerk should specify the affidavits used, and to enable him to do so, he should, at the time, mark them as filed on the motion." The California statute referred to applies to all orders made upon affidavits filed. In that it differs from the Utah statute. If we concede, however, that section 538 of the Utah statute above quoted, applies to all orders made upon affidavits filed, still we cannot reverse the judgment of the court below; first, because all the affidavits used on the hearing of the motion are not found in the transcript; second, those copied into the transcript are not specified in the certificate of the clerk, they are not marked as filed on the motion or identified in any way. Such a practice would result in uncertainty and in reversals on imperfect or partial records. We are of the opinion that the order appealed from cannot be disturbed on this record. It is therefore affirmed.

EMERSON, J., and TWISS, J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 9,610.

MAULDIN v. COX ET AL.

Department One. Filed August 27, 1885.

HOMESTEAD—LEASE AND DEED OF BY HUSBAND—HUSBAND OR TENANT CANNOT HOLD ADVERSELY—POSSESSION—NOTICE.—Plaintiff and her husband, on the thirty-first of August, 1860, jointly executed a declaration of homestead on the land in controversy, and continued to reside thereon until 1867. On September 27, 1871, the husband executed a lease of the premises to defendants for a term of two years from February 8, 1872. This lease was duly acknowledged and recorded June 11, 1872. On that day the husband executed and delivered to defendants a second lease of the same premises for a term of ten years from January 1, 1874, lease acknowledged and recorded June 11, 1872. On the twenty-fifth day of October, 1876, said husband executed to defendants a deed of conveyance of all the land in question, which deed was duly acknowledged and delivered by the grantor, but never recorded. On the twenty-second day of January, 1880, said husband executed and delivered to defendants a third lease of the same premises for a term of ten years from date. The lease was signed and acknowledged by defendants also, and duly recorded at request of defendant Clark, January 31, 1880. No consideration was actually paid therefor. The plaintiff herein was not a party to either or any of the leases, or to the deed of conveyance, and had no knowledge of the execution or existence of said deed, until after the death of her husband in 1882. Defendants entered into possession under their first lease, and have ever since retained such possession, using the land for grazing and other purposes, of which possession by defendants, plaintiff was cognizant. *Held*, that until the delivery of the deed, the defendants, as tenants of the husband, were estopped from denying his title; that the *locus in quo*, being a homestead, the husband could not hold the same adversely to his wife, and, consequently, the defendants could not claim adversely to her; that the defendants, having entered into possession under the leases, could not claim adversely to her, during the continuance of the terms, as she never had any actual or constructive notice of the defendant's deed, or possession begun thereunder.

ADVERSE POSSESSION—ESSENTIAL ELEMENTS OF—STATUTE OF LIMITATIONS.—An essential element of the adverse possession which will set the statute of limitations in motion is, that it be open and notorious, as well as continuous; it must be of such a character as to operate as a notice to the holder of the true title that possession is held under a claim of right. The acts of the possessor should indicate clearly that he holds, not for the true owner or in subordination to his title, but for himself and in opposition to such owner. The acts should be such as, when proven or admitted, will establish an *ouster* of the owner. He must be entitled to maintain an action before the statute of limitations will run against him. He has a right also to be reasonably informed of the claim set up against him, either by acts or words, before the statute will run, and if the acts of the party in possession are of such a character as reasonably to indicate to the owner that the holding is not adverse, but in subordination to the title, the statute will not run.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

Hart & White, for the appellants.

Grove L. Johnson and *Thornton & Merzbach*, for the respondent.

SEARLS, C. Action of ejectment to recover a tract of land in Sacramento county. The cause was tried before a jury, verdict and judgment for plaintiff. Defendants moved for a new trial which was denied and the cause comes upon appeal from final judgment and order overruling motion for new trial.

The facts necessary to a determination of the questions involved are as follows:

In 1852 plaintiff, then a married woman and the wife of B. F. Mauldin, settled with her husband upon the land in question where they continued to reside with their family until 1867. On the

thirty-first day of August, 1860, a declaration, of homestead in due form was executed by the plaintiff and her husband jointly, covering the land, and which declaration duly acknowledged, was recorded in the office of the county recorder of Sacramento county, October 15, 1860. On the tenth day of June, 1869, a patent from the state of California was issued to B. F. Mauldin, the plaintiff's husband. Patent recorded August 18, 1871. In 1867 plantiff and her husband removed from the said premises, and took up their residence in the city of Sacramento, where they continued to reside until the tenth day of June. 1882, when B. F. Mauldin died. The sons of plaintiff and her husband remained upon the land about one year after their parents removed therefrom and then left it, since which time none of the family have occupied the land or any part thereof.

On the twenty-seventh day of September, 1871, B. F. Mauldin executed a lease of the premises to defendants for a term of two years from February 8, 1872; rent reserved, four hundred dollars for the term. The lease was duly acknowledged and recorded June 11, 1872. Before the expiration of the term and on the eleventh day of June, 1872, B. F. Mauldin executed and delivered to defendants a second lease of the same premises for a term of ten years from January 1, 1874; rent reserved, nine hundred dollars for term; lease acknowledged and recorded June 11, 1872. On the twenty-fifth day of October, 1876, said B. F. Mauldin executed to defendants a deed of conveyance of all the land in question, which deed was duly acknowledged and delivered by the grantor, but never recorded. Nominal consideration, two thousand and five hnndred dollars. The real consideration, as stated by defendant Clark, was one thousand five hundred dollars, made up as nearly as we can determine from his testimony as follows:

Rent reserved on ten years lease	$900
Interest	300
Cash paid at execution of deed	200
Total	$1,500

On the twenty-second day of January, 1880, B. F. Mauldin executed and delivered to defendants a third lease of the same premises for a term of ten years from date; rent reserved, one thousand dollars for term. The lease was signed and acknowledged by defendants also, and duly recorded at request of defendant Clark, January 31, 1880. No consideration was actually paid therefor. The plaintiff herein was not a party to either or any of the leases, or to the deed of conveyance, and had no knowledge of the execution or existence of said deed, until after the death of her husband in 1882

Defendants entered into possession under their first lease, and have ever since retained such possession, using the land for grazing and other purposes, of which possession by defendants, plaintiff was cognizant.

This action was brought August 10, 1883. The *locus in quo*, having been by the acts of plaintiff and her deceased husband dedi-

cated as a homestead, and plaintiff not having joined in the leases or deed thereof as provided for the conveyance of a homestead, it is not contended that she has lost her right thereto, by any direct and affirmative act of her own.

Defendants have pleaded the statute of limitations, and set up an adverse possession of more than five years, next before suit brought, under which they claim the right of plaintiff to recover is barred.

It is provided by section 370 of the code of civil procedure, that "when a married woman is a party, her husband must be joined with her, except when the action concerns her separate property, or her right or claim to the homestead property, she may sue alone."

The action in this case clearly related to her right and claim to the homestead property, consequently the husband was not a necessary party and plaintiff could at any time have maintained an action in reference thereto without joining her husband as a party plaintiff.

As to this property, there was no existing disability by reason of coverture; hence it follows that the statute of limitations may be successfully invoked against plaintiff, provided the facts establish an adverse possession in defendants as against her: Kapp v. Griffith, 42 Cal., 408; Wilson v. Wilson, 36 Cal., 447. We are, therefore, led to an inquiry as to the sufficiency of the facts to constitute adverse possession in defendants against this plaintiff. Defendants entered into possession of the demanded property under lease from B. F. Mauldin, of October 4, 1871, and continued as his tenants under that, and the subsequent lease of ten years, dated June 11, 1872, which took effect January, 1874, until the execution and delivery by Mauldin of the deed of conveyance dated October 25, 1876; as such tenants they were estopped from denying the title of their landlord during that period.

The fact that these leases were liable at any time to be avoided by the wife of Mauldin, for want of capacity in her husband to make them upon the homestead, does not alter the rule. The tenant is estopped, during his term, from denying the title of his landlord, not because the title is good, but because by accepting a lease and entering under it, he has acknowledged the title to be in his lessor, and is precluded from showing facts inconsistent with such acknowledgment.

They were also estopped during the same term from claiming the homestead adversely to the wife of Mauldin, the plaintiff herein. It was held in Frink v. Alsip, 49 Cal., 102, that where the husband rents land from the owner, and moves on to it with his family, in subordination to the owner's title, the wife cannot, during coverture, claim the premises adversely to the owner so as to set the statute of limitations in motion.

In First National Bank of S. B. v. Guerra, 61 Cal., 109, it was held that the wife could not claim, during coverture, adversely to the husband, or to those holding under him.

We think the converse of the proposition is also true, and that, during coverture, and while he remains the head of the family, the

husband cannot claim the homestead adversely to the wife. As the head of the family, he may select the place of residence. He may choose any reasonable place or mode of living, and the wife must conform thereto: C. C., sec. 156.

He may remove his family from the homestead at will, subject only to the selection of a reasonable place of residence. He may manage and control the common property, and over the homestead may with propriety exercise acts of ownership, which in another would be evidence of an adverse holding, but which in the husband indicate the assertion of the mutual rights of the parties to the marital relation.

Section 370, of the code of civil procedure, gives to a married woman a right to sue alone, when the action is against her husband or when her separate property or her right or claim to the homestead is concerned. No question is made as to her right to sue her husband where her right to the homestead is invaded. The remedy is given where her right is invaded whether by the husband or a stranger. The question under discussion, however, is not has she a remedy? but may her right be invaded by an adverse holding on the part of the husband so as to render such remedy necessary?

It would seem more in harmony with our conception of the marital relation to say that while the husband remains the head of the family, that as to the homestead his acts of possession and control will be taken as evidence of joint ownership with the wife, and that no presumption of an adverse holding can be indulged or allowed. If he may hold adversely to his wife, her right to the homestead can be determined without her consent and in a manner different from that contemplated by the code. Her right to maintain an action against him, upon his claiming adversely, will result in gauging her title, not by the certain provisions of the code, but by the more uncertain oral testimony of witnesses. The acts of the husband in controlling the property, in themselves innocent and proper, will be liable in after years to be tortured into evidence of an adverse holding, where none was originally designed. All necessity for vigilance between husband and wife, in guarding their property rights, should be, as far as may be, avoided. Again, if the husband can hold the homestead adversely to the wife, then she may maintain ejectment for its recovery, but when restored to possession her husband may at once rightfully remove her from the premises, or if his adverse possession shall have ripened into a title, which enables him to prevail in an action, he must continue to keep her out of possession, or she may again file a declaration of homestead on the same property, and start anew on the circuit of strife and litigation.

For these and other reasons we conclude that during coverture, and while the husband remains the head of the family, neither party to the marital relation can hold the homestead adversely to the other.

There is nothing in the record to show that B. F. Mauldin ever claimed the homestead adversely to plaintiff, and as defendants are estopped from claiming adversely against the former while holding under the lease, so they cannot claim during the same period against plaintiff, who was a joint owner with her husband of the title and property, out of which their estate was carved and into the possession of which they entered.

2d. It is claimed by defendants that whatever their position as to plaintiff may have been prior to the deed from Mauldin of October 25, 1876, since the execution and delivery of that deed, they have been in the adverse possession of the property and, as more than five years had elapsed between the delivery of the deed and suit brought, plaintiff's right is forever barred.

An essential element of the adverse possession which will set the statute of limitations in motion, is, that it be open and notorious, as well as continuous; it must be of such a character as to operate as a notice to the holder of the true title that possession is held under a claim of right. The acts of the possessor should indicate clearly that he holds, not for the true owner, or in subordination to his title, but for himself, and in opposition to such owner. The acts should be such as, when proven or admitted, will establish an *ouster* of the owner. He must be entitled to maintain an action before the statute of limitations will run against him.

He has a right also to be reasonably informed of the claims set up against him, either by acts or words, before the statute will run, and if the acts of the party in possession are of such a character as reasonably to indicate to the owner that the holding is not adverse, but in subordination to the title, the statute will not run.

In the present case, the defendants were in possession as tenants under leases of record, and which would not expire until January 1, 1884.

In 1880 another lease for ten years from date by Mauldin to defendants, executed and acknowledged by all the parties thereto, was placed of record.

Plaintiff knew defendants were in possession of the premises. This was sufficient to put her upon inquiry; such inquiry, if pursued, showed that they went into possession as tenants of her husband, and in subordination to the title held by him jointly with herself.

We must presume her to have known that, under section 326, code of civil procedure, the possession of the tenant is deemed the possession of the landlord, not only during the existence of the lease, but for five years after the termination of the tenancy. Of the absolute deed, which her husband made to defendants, and which was never recorded, she knew nothing. Indeed, its existence seems to have been studiously concealed from her.

To plaintiff, then, the possession of defendants naturally presented the idea of subordination to the right or claim held by her to the homestead. It was such in its inception; for aught she knew or could learn, it remained as such up to the death of her husband.

The fact that the leases were void as against her, avails nothing in favor of defendants. He who enters under a void lease is estopped equally with him who holds under a valid instrument.

It is true the defendants testify in substance that they only accepted the lease of January 20, 1880, at the urgent request of B. F. Mauldin, that they did not desire it, that they paid no rent and did not enter into possession thereunder.

We assume these statements to be true, but there are two answers:

First—These facts were unknown to plaintiff. To her the case was only presented in the aspect of a new lease for a term of ten years, executed by her husband and defendants upon the homestead.

Under the facts as then appeared to her, defendants could not set up an adverse title.

Second—Placing out of view altogether the lease of 1880, and treating it as never having been made, we still find the lease of June 11, 1872, for ten years, commencing January 1, 1874, and which, consequently, would not expire until January, 1884, and which leaves defendants as against plaintiff in no better position.

They had, it is true, a secret conveyance of the property, but having been in possession under the lease, the plaintiff, having no notice of the deed, was not bound thereby.

An entry to set the statute of limitations in motion must be sufficiently open and notorious to give the owner notice of the hostile claim and possession begun thereunder, and it must be hostile.

The owner must have knowledge of the adverse entry, or such information as puts him upon inquiry: Sedgwick and Waite on Trial of Title to Land, sec. 730.

"Such knowledge, or the means by which such knowledge may be attained, must be brought home to the person who was seized or possessed of the land, because the statute proceeds on the ground that he, knowing that a cause of action exists in his favor for the intrusion, yet acquiesces in it, and does not attempt to regain the possession of his land in the mode provided by law. A clandestine entry or possession will not set the statute in motion, because the owner of the land cannot be said to have acquiesced in the wrongful entry or possession. The owner will not be condemned to lose his land because he has failed to sue for its recovery when he had no notice that it was held or claimed adversely:" Thompson v. Pioche, 44 Cal., 508.

These views are conclusive of the right of defendants to recover on their claim of adverse possesion, and of the whole case.

The instructions of the learned judge who tried the cause in the court below afford defendants no ground for complaint.

The judgment and order denying a motion for a new trial should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 9,509.

JAMES ET AL. v. FULKERTH.

Department Two Filed August 27, 1885.

SALE OF CATTLE—ACTUAL AND CONTINUED CHANGE OF POSSESSION.—A sale of a band of cattle, the custody of which remained in the same person after as before the sale, and which were not removed from the lands of the vendor where they were grazing when sold, is void as against attaching creditors of the vendor, because not accompanied by an immediate delivery and actual and continued change of possession.

APPEAL from a judgment of the superior court of Stanislaus county, entered in favor of the defendant, and from an order denying the plaintiffs a new trial. The opinion states the facts.

T. A. Caldwell, for the appellants.

Loutitt & Lindley, for the respondent.

FOOTE, C. Action of claim and delivery for a band of cattle. There was no conflict of evidence in the case. And it does not appear from it that there was such an immediate delivery, and actual and continuous change of possession, of the property in controversy, from the vendor to the vendees, as will satisfy the provisions of section 3,440, civil code. The custody of the band of cattle remained in the same person after as before the sale, and before they were seized in this action by the sheriff they had not been removed from the land of the vendor where they were grazing when sold.

We are, therefore, of opinion that the judgment and order of the court below should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 9,486.

WHITE v. DISHER.

Department Two. Filed August 27, 1885.

WITNESS FALSE IN PART OF HIS TESTIMONY—PRESUMPTION.—Section 2,061 of the code of civil procedure, subdivision 3, provides that a "witness false in one part of his testimony *is to be* distrusted in others." Consequently, it is error for the court to instruct the jury that such witness *may* be distrusted. The distrust which is cast upon such witness is a presumption of law for the court, with which the jury has nothing to do, except to receive and act upon. It is a rebuttable presumption, to be overcome by facts and circumstances of which they are the sole judges.

APPEAL from a judgment of the superior court of Trinity county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

W. J. Tinnin and *T. L. Carothers*, for the appellant.

C. E. Williams and *J. W. Philbrook*, for the respondent.

SEARLS, C. Action to recover damages on breach of contract. Plaintiff had verdict and judgment for seven hundred and fourteen dollars and costs. Defendant moved for a new trial, which was denied, and the appeal is from final judgment and order overruling motion for new trial.

We have examined the several errors assigned by appellant, and conclude that with a single exception they are not supported by law.

The exception referred to is as follows:

At the trial defendant asked the court to instruct the jury in these words:

"A witness willfully false in one part of his testimony is to be distrusted in his other testimony." The instruction was modified by the court by striking out the words "is to" and inserting in lieu thereof the word "may," so that the instruction as given read: "A witness willfully false in one part of his testimony *may* be distrusted in his other testimony."

To which modification of the instruction, defendant excepted, and the ruling is assigned as error.

Section 2,061 of the code of civil procedure, subdivision 3, provides: "That a witness false in one part of his testimony is to be distrusted in others."

The rule as formulated in the code is substantially the same as that laid down by law-writers and followed by the courts prior to the adoption of our codes.

In People v. Sprague, 53 Cal., 494, the court say: "The maxim *falsus in uno, falsus in omnibus*, is not to be construed as authorizing a court to charge that if a witness *perjures* himself in respect to one or more particulars, the jury must reject all his testimony: People v. Strong, 30 Cal., 156.

"This rule is, that the jury *may* reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point, that is to say, the jury being convinced that a witness has stated what was untrue, not as the result of mistake, or inadvertence, but willfully and with the design to deceive, must treat all his testimony with distrust and suspicion, and reject all, unless they shall be convinced, notwithstanding the base character of the witness, that he has, in other particulars, sworn to the truth.

"The third subdivision of section 2,061, of the code of civil procedure, is but declaratory of the rule above considered, and by requiring a jury to distrust, necessarily authorizes them to reject all the testimony of such a witness in a proper case."

In that case defendant's counsel had asked the court to instruct the jury in the language of the code, and the court had added the word *willfully* before the word false, and the contention in this court was as to the propriety of such addition, and it was held proper, and that "the word *willfully* did not change the effect of the instruction as offered." People v. Soto, 59 Cal., 367, and People v. Hicks, 53 Cal., 354, are to the same general effect.

The question involved in the present case is, however, somewhat different from the contention in those cited.

Here the law provides that a witness willfully false in one part of his testimony *is to be distrusted*, not that the jury *may* or *may not* distrust his testimony, but they are to be told that, as matter of law, his testimony *is to be* distrusted. This distrust forms the basis or standpoint from which they must view his testimony, the standard by which to weigh his utterances. It is true that, notwithstanding this legal distrust which the law casts upon a witness willfully false in a material part of his testimony, the jury may believe him upon other points—they are to be the sole judges as to that—there may be abundant reasons why they not only *may*, but why they should believe him in other particulars. The truth is not to be rejected, because it passes through a false medium, but as to the existence of the truth the jury is the sole judge.

The jury was told that in such cases a witness *may* be distrusted, the law says he *is to be* distrusted, that is, that he must be distrusted. A thing that *is to be*, *must be*. The distrust which is cast upon a witness willfully false in a material part of his testimony, is a presumption of law, for the court, and with which the jury has nothing to do, except to receive and act upon. It is a rebuttable presumption, to be overcome by facts and circumstances of which they are the sole judges.

The word *may*, inserted by the court, was not synonymous with the *is to*, of the code; it imported to the jury that they might, or might not, at their option, distrust a witness, willfully false in one portion of his testimony, when, as matter of law, they *must* distrust him, and may or may not, notwithstanding such distrust, believe him.

The law presumes every man accused of crime innocent until his guilt is shown. This is a presumption not to be acted upon or rejected by a jury at their will or pleasure. So, a witness willfully false is to be distrusted by a jury, and with this distrust as a factor in the problem, they may, they are at liberty to, believe or not believe him him in other particulars.

We think the court below erred in its modification of the instruction, and that for such error the judgment and order should be reversed and a new trial ordered.

BELCHER, C. C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed and the cause remanded for a new trial.

No. 9,602.

KEYBERS *v.* MCCOMBER.

Department One. Filed August 27, 1885.

JURISDICTION OF INFERIOR AND SUPERIOR COURTS—PRESUMPTIONS.—A justice court is an inferior court and its jurisdiction must be shown affirmatively, by a party relying upon or claiming any right under its judgments. No presumption will be indulged in favor of its jurisdiction. In superior courts, the presumption is in favor of the regularity of their proceedings and of their jurisdiction, and he who challenges either must show affirmatively the grounds of his objection.

THE SAME—WANT OF JURISDICTION—EFFECT OF.—It does not follow, however, that the rule of decision differs upon the same state of facts, when ascertained. It is only in the mode of ascertaining them that the distinction exists. In a *court of record* a given fact is presumed, but when shown by the record not to exist, error is made to appear; in a *justice court*, the same fact must be proven or it will be presumed not to exist, and like error is manifest.

JUSTICE COURT—SUMMONS—ERRONEOUS DIRECTION TO DEFENDANTS—JUDGMENT.—A summons in an action for trespass to land, brought in a justice court, should contain a direction to the defendant, that if he failed to answer, the plaintiff would "apply to the court for the relief demanded." If, however, instead of such direction the summons states that in case of failure to answer "the plaintiff would take judgment, for the amount claimed in the complaint," (stating it), a judgment by default rendered thereon, after a personal service on the defendant, is voidable only, and not void, and cannot be collaterally attacked.

EXEMPTION OF PROPERTY FROM EXECUTION IS A PERSONAL PRIVILEGE which a debtor may claim or waive at his pleasure.

EXECUTION—EXEMPTION HOW AND WHEN MUST BE CLAIMED.—Where the debtor has more property of a particular kind liable to seizure than is exempt from execution, and a writ is levied upon a portion only thereof, leaving as much as is by law exempt, and thereafter the debtor for the first time claims as exempt the property levied upon or a portion thereof, and leaving in the hands of the officer a less quantity than is necessary to satisfy his writ, then, and in that case, the debtor to make good his claim of exemption must offer to surrender to the officer the other property in his hands of the same general kind, subject to execution, or so much thereof as may be necessary to satisfy the writ, and failing to do so, he is not entitled to recover against the officer.

APPEAL from a judgment of the superior court of Sacramento county entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

W. H. Beatty and *S. C. Denson*, for the appellant.

A. P. Catlin and *W. C. Crossett*, for the respondent.

SEARS, C. This is an action to recover possession of two horses, their harness, and a quantity of wood; or, if a delivery thereof cannot be had, the value thereof, and damages for detention.

Defendant had judgment. The appeal is from this judgment, and the case rests upon the judgment roll.

The demanded property was taken by the defendant as a constable, under an execution regular in form and valid on its face, issued from a justice court, against the property of plaintiff. Plaintiff contends the taking was wrongful, and bases his claim upon two grounds:

1. That the summons was fatally defective in this: The action was for damages on account of trespass upon land, and the summons, in other respects in due form, instead of a notice as required in such cases, by subdivision 5, of section 844, code of civil procedure, that if defendant, plaintiff here, failed to answer, the plaintiff would "apply to the court for the relief demanded," contained the notice specified in subdivision 4 of the same section, viz.: that in case of failure to answer, plaintiff would take judgment for two

hundred and ninety-nine dollars—that being the sum claimed in the complaint.

2. That conceding the regularity of the judgment against him, the two horses and their harness were exempt from execution.

First, as to the validity of the judgment. A justice court is an inferior court, and its jurisdiction must be shown affirmatively, by a party relying upon or claiming any right under its judgments: Jolly v. Foltz, 34 Cal., 321. No presumption will be indulged in favor of the jurisdiction of inferior courts: King v. Randlett, 33 Cal., 318.

In superior courts, the presumption is in favor of the regularity of their proceedings, and of their jurisdiction, and he who challenges either, must show affirmatively the grounds of his objection.

It does not follow, however, that the rule of decision differs upon the same facts, when ascertained. It is only in the mode of ascertaining them that the distinction exists.

In a *court of record* a given fact is presumed, but when shown by the record not to exist, error is made to appear; in *justice court*, the same fact must be proven; or it will be presumed not to exist, and like error is manifest. It has been said that the "law required courts of special jurisdiction to follow the rules which create and govern them, and that that, which in a court of general jurisdiction would be a mere irregularity, would absolutely deprive the former of all jurisdiction:" Whitwell v. Barbier, 7 Cal., 54. Similar language may be found in a number of cases, but an examination shows that in most of them, it is used to illustrate the doctrine that in courts of record, facts, not appearing, will be presumed to exist, and their non appearance will be treated as a mere irregularity, while their absence, in cases arising in inferior tribunals, will be deemed fatal to the validity of the proceedings. If it appears upon the face of the proceedings, that a court of record had no jurisdiction, manifestly it must be as fatal to a judgment as would the absence of the same fact in a court of limited jurisdiction.

We are not now referring to the distinctions made in reference to jurisdiction of the subject matter in different courts, but to the jurisdiction of the person.

The latter, in this state, is gained in ordinary civil actions in courts of original jurisdiction through the instrumentality of a summons, except in cases of voluntary appearance.

The summons in cases arising in our superior courts is in substance the same as those issued from justice courts. Each is required to contain the same notice to the defendant, viz.: in cases arising on contract for the recovery of money or damages only, that if defendant fails to answer, judgment will be taken against him for the sum claimed, stating it. In other actions a notice that unless defendant so appear and answer, the plaintiff will apply to the court for the relief demanded: C. C. P., sections 407, 844. Jurisdiction of the person of the defendant is gained alike in the superior and justice courts by service of the summons. Against his consent, jurisdiction can be gained in no other manner.

The requirements of the summons as to the notice being the same in both courts, if we are correct in our conception of the principle involved, it necessarily follows that if the error complained of appeared affirmatively upon the record of a superior court, to the exclusion of every presumption, it should receive precisely the same interpretation as would be given to it in justice court.

In this view of the case, the question for decision is, was the judgment of the justice court *void* or only *voidable*? That the notice contained in the summons was defective, and that the judgment was erroneous and subject to be set aside by the justice or reversed on appeal is conceded on all hands. It was certainly *voidable*.

Was it void? The summons and complaint were properly served upon defendant; he failed to answer, a trial was had and judgment was rendered against him for two hundred and ninety-nine dollars, the sum demanded in the complaint and specified in the summons. The court had jurisdiction of the subject matter of the suit and if the summons is to be deemed as sufficient to give jurisdiction of the person of the defendant, then the judgment, being such as the justice had a right to render, though irregular and subject to reversal, was valid and binding until directly attacked, and is not subject to review in this collateral proceeding.

In State of California v. Woodlief, 2 Cal., 242, the summons required defendant to answer in thirty days, instead of forty as by statute required, and was in other respects defective, and this court held it was insufficient to support a judgment by default. This case, however, came up by a direct appeal from the judgment and cannot be considered as concluding a case in which the question arises collaterally.

Porter v. Herman, 8 Cal., 619, is to the same effect and the question arose in like manner. People v. Weil, 53 Cal., 253, also came up on appeal and a like doctrine was maintained. In Polack v. Hunt, 2 Cal., 193, the summons was defective and the court below permitted it to be amended. On appeal it was urged that the summons did not contain a similar notice to defendant, as that now required by the code and that the court gained no jurisdiction. This position was overruled and the action of the court below was approved. In Ward v. Ward, 59 Cal., 141, the appeal was from an order vacating a judgment by default entered in an action upon a contract of marriage, and the summons was defective in substanially the same particular as here, and the court say: "We have no doubt that the entry of a judgment by default in the absence of a notice in the summons that in case the defendant failed to appear and answer within the time prescribed by law, the plaintiff would take judgment for the sum demanded in the complaint, was at least such an irregularity as would justify the court in vacating the judgment."

But from the cases above enumerated we can make but little progress in an inquiry directed solely to the validity of a judgment when collaterally attacked. "While it is advisible in all cases to literally comply with the provisions of the code, nothing short of a

substantial departure therefrom can properly be held to be fatal to a proceeding under it. 'Its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice:'" Shinn v. Cummins, 2 W. C. R., 216. Such errors as are not prejudicial to parties are to be disregarded everywhere, and those which are prejudicial when committed by a court having jurisdiction to act, must be taken advantage of by direct proceedings.

In this case the summons was, save in the one respect, regular. It was served with the complaint. The defendant was thereby apprised of the nature and scope of the action, of the time and place for answer, and the amount or sum of money sought to be recovered.

The summons was, we think, so far regular as to confer jurisdiction of the person of defendant upon the court, and make it the duty of the former to combat the proceedings if he would not be bound by them. It cannot be likened to a case in which there is no service, and in which a defendant may not be aware of the proceedings against him, but is a case of service of an irregular process, which might have been amended, because irregular and not void, or might have been set aside by the court from which it issued, or on an appeal, but which could not be entirely ignored; which was, in short, *voidable* and not void, and therefore the judgment predicated upon it cannot be attacked in this collateral proceeding. The following cases, though not directly in point, have a bearing on the question: Dorente v. Sullivan, 7 Cal., 279; Cheming Canal Bank v. Judoon, 4 Selden, 254; Drake v. Duvenick, 45 Cal., 455; Freeman on Judgments, sec. 126-135; Sacramento Savings-Bank v. Spencer, 53 Cal., 740; Cloud v. El Dorado County, 12 Cal., 135.

Second. As to the exemption of the two horses and their harness.

Plaintiff was a farmer, and had eight work horses, besides a number of colts. His sons managed the farm on shares. One of his sons was at Folsom with a four-horse team, when defendant, as constable, levied upon and took into possession the two lead horses and their harness, under an execution regular in form and against the property of plaintiff.

On the sixteenth day of November, 1883, plaintiff served a written notice upon defendent, claiming the two horses and their harness as exempt from execution under subdivision 3 of section 690, code of civil procedure. He did not tender defendant any of the other horses, or any property, in lieu of the two horses levied upon. Defendant delivered the horses and harness to plaintiff on the nineteenth of November, 1883, three days after the demand.

Under the third subdivision of section 690, code of civil procedure, two horses and their harness, of plaintiff, a farmer, were exempt from execution.

This exemption was a personal privilege of plaintiff, which he could claim or waive at his pleasure.

Having more horses than the number exempt by law, plaintiff had a right to elect which he claimed as exempt. It was not incumbent upon him to make the electien at the date of the levy, for, so far as appears, he was not present thereat; but it devolved upon him to do so within a reasonable time after notice of such levy.

This he did, and six days after the levy gave notice to the officer that he claimed the two horses and their harness as exempt from execution.

In the absence of a showing to the contrary, this notice will be deemed to have been in time.

Where the debtor has more of a particular kind of property than is exempt from execution, he may select which he will claim, but in doing so, "according to a preponderance of authorities, the defendant, in claiming the right of selection, must offer to surrender to the officer the other property in his hands subject to execution:" Freeman on Executions, sec. 212; Smothers v. Haley, 47 Ill., 331; Bannett v. Bowman, 53 Ill., 460. There would seem to be reason in this requirement.

We should not lose sight of the beneficent objects of the exemption laws, or do or say ought to abridge these rights secured thereby.

On the other hand, the wise provisions of the laws should not be used as a means for unjustly shielding property not exempt from the claims of creditors.

It is quite proper to give the debtor a reasonable time within which to make his selection of that which he will claim, but if he does not do so at the time the levy is made, the opportunities and temptations to dispose of property not levied upon, or place it beyond the pale of the law, and then claim as exempt that which has been taken in execution, becomes great, and if yielded to, may result in fraud upon creditors.

If the exemption is claimed at the time of levy, there being other property of the same kind not claimed, it is reasonable to suppose the officer holding an execution will levy upon that not claimed and his opportunity to do so shall not be abridged by reason of the claims of exemption being asserted at a later date.

We hold, therefore, where, as in this case, the debtor has more property of a particular kind liable to seizure than is exempt from execution, and a writ is levied upon a portion only thereof, leaving as much as is by law exempt, and thereafter the debtor for the first time claims as exempt the property levied upon or a portion thereof, and leaving in the hands of the officer a less quantity than is necessary to satisfy his writ, then, and in that case, the debtor to make good his claim of exemption must offer to surrender to the officer the other property in his hands of the same general kind, subject to execution, or so much thereof as may be necessary to satisfy the writ and failing to do so, as in this case, he is not entitled to recover against the officer.

We limit the rule as above to cases where the judgment debtor has extra property of the particular kind taken, for the reason that

the facts of this case do not require us to extend the inquiry to cases where a judgment debtor may have property of a different character subject to execution, and in the consideration of which, questions as to the duty of the debtor to assist the officer of the law in ferreting out his property may arise.

The judgment of the court below should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

No. 11,012.

EMPIRE G. MINING CO. v. BONANZA G. MINING CO.

Department Two. Filed August 28, 1885.

CONFLICT OF EVIDENCE—VERDICT NOT DISTURBED.—Where the evidence is conflicting, in an action to recover for trespass upon a mining claim, as to the amount of damages suffered by the plaintiff, the verdict of the jury thereon will not be disturbed.

TRESPASS—INSTRUCTIONS—MEASURE OF DAMAGES.—In such action, the defendant cannot complain of an instruction that if the jury found that he entered upon the plaintiff's claim, and dug and removed gold-bearing earth therefrom, the true measure of damages to plaintiff would be an amount of money which will fully compensate him for all detriment proximately caused thereby.

THE SAME—PLAINTIFF ENTITLED TO NOMINAL DAMAGES.—For every trespass upon real property the plaintiff is entitled to, at least, nominal damages. Consequently, the defendant cannot justify his act, and obtain a verdict by showing the value of the property to be less than the expense of its severance from the realty.

EVIDENCE TO CONTRADICT WITNESS.—Affidavits and letters of a witness, which tend, in a slight degree, to contradict his testimony, are to that extent, and for that purpose, admissible in evidence.

MOTION TO TAX COSTS—ORDER ON AFTER JUDGMENT—APPEAL.—A motion to tax a cost bill is a special motion, and an order thereon is a special order, and if made subsequent to the rendition and entry of final judgment, can only be reviewed in the supreme court by a direct appeal therefrom.

APPEAL from a judgment of the superior court of Sierra county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

John Gale, for the appellant.

Van Clief & Wehe, for the respondent.

SEARLS, C. Action to recover damages for trespass upon a mining claim, and to obtain an injunction restraining defendant from the commission of like trespasses. Plaintiff had verdict and judgment for five thousand dollars and costs, taxed at one thousand three hundred and forty-four dollars and forty-five cents. Of the sum taxed as costs, nine hundred and twenty-six dollars was for expenses of a survey made under an order of the court upon application of plaintiff, and for its benefit. Defendant moved for a new trial, which was denied, and the appeal is taken from final judgment and order denying motion for new trial.

Appellant claims that the verdict is unsustained by the evidence, wholly inconsistent with the instructions of the court, and apparently given under the influence of prejudice and passion.

Plaintiff and defendant were the owners of adjoining mining claims, which were worked by drifting beneath the surface. Defendant had worked beyond its line, and upon the claim of plaintiff. The damage sustained by plaintiff thereby, was the problem which the jury was required to solve.

Those familiar with this character of mining, will readily comprehend the difficulties in the way of determining the value of the material removed. The operations are mainly carried on through underground tunnels, drifts and works not open to inspection, and to which the public has no access. The pay dirt, as it is termed, usually of limited quantity, is removed to the surface to be washed, and in paying mines, being of large value compared with its bulk, is frequently washed by the owner, or some trusted agent, who alone can know with certainty the value of the proceeds. These and several other causes conspire to prevent the introduction by the party injured in such cases of testimony precise in character.

The most that can or should be demanded is to require such probative facts as best tend to illustrate and demonstate the ultimate object in view. To the eye of the experienced miner, the appearance of the gravel with which he is entirely familiar may afford some indication of its value, its situation in the mine, whether upon or off the channel, near or remote from the bed-rock, the value of ground adjoining or in close proximity, are circumstances which with many others are proper to be considered by a jury and are frequently the best and only evidence within reach. If this class of circumstances, all converging on the very point at issue, tend to exaggerated results, it will generally be found that the party whose acts are complained of, is possessed of all the necessary facitities for correcting the error.

In the case at bar, there was a marked and substantial conflict in the testimony. Witnesses for defendant testified very positively to facts from which it would be reasonable to suppose the mining ground in question fell short of paying expenses, while on the part of plaintiff there was testimony tending to a state of facts in support of a larger verdict than was rendered by the jury.

Whether the jury deemed it improbable that defendant would have continued for some months to work the ground of its neighbor at a heavy loss to itself, or by what particular process they reached their verdict we need not speculate, provided always there was ample testimony in support thereof.

With testimony thus conflicting, a jury, composed as we may well suppose, in part, at least, of miners, was peculiarly qualified to deal, and we should not feel authorized to disturb their verdict merely because upon the face of the record we might feel like coming to a different conclusion.

Appellant seems to lay some stress upon the fact that the instructions of the court were of such a character as to demand a different verdict.

The only instruction asked by the plaintiff, so far as appears in the record, was to the effect that if the defendant entered upon plaintiff's claim, and dug and removed gold-bearing earth therefrom, the true measure of damages to plaintiff will be an amount of money which will fully compensate it for all detriment proximately caused thereby.

The instruction embodies the rule laid down by our civil code as the measure of damages for breach of an obligation arising from contract: C. C., sec. 3,300.

No rule more favorable to the defendant could reasonably be asked.

The instructions given at the request of defendant from 1 to 8, both inclusive, were quite as favorable as ought to have been given, and one of them, the fourth, was entirely too favorable.

It was to the effect that if the jury found the necessary expense and cost of digging the gold-bearing earth and extracting the gold therefrom, equaled or exceeded the value of the gold dust extracted, they should find for the defendant.

We do not think the question of trespass, or no trespass, is to be determined on the basis of profit and loss.

For every trespass upon real property, the law presumes nominal damages: Atwood v. Fricot, 17 Cal., 38.

The instruction under consideration was, probably, based upon the rule as laid down in Mayo v. Tappan, 23 Cal., 306, in which the court says:

"The complaint in the case alleges that the defendants, at divers times, wrongfully entered upon a portion of plaintiff's mining claim, and extracted the gold and gold-bearing earth from a portion thereof, which gold and gold bearing earth they wrongfully carried away and converted to their own use; and the value of the gold thus carried away is alleged to have been two thousand dollars. No demand of the possession of the gold after it was separated from the earth appears to have been made upon the defendants, and the gravamen of the action appears to be the injury done to the land itself by the acts of the defendants. The proper rule for damages in a case like the present, is the value of the gold-bearing earth at the time it was separated from the surrounding soil, and became a chattel. * * * In estimating these damages, the expense of extracting the gold and separating it from the earth after it is first moved from its original location, is to be deducted from the value of the gold taken out of the mining ground of the plaintiffs." This decision was affirmed in Goller v. Fett, 39 Cal., 482.

The complaint in this case, is substantially the same as in Maye v. Tappen, and there is no disposition to question the doctrine enunciated in that case.

The rule cannot, however, be extended, so as to entitle a defendant who has committed a trespass to justify his act, and obtain a verdict by showing the value of the property taken to be less than the expense of its severance from the realty.

There was no error in the admission of the affidavit and letters of Southerland in evidence. He was superintendent of the corporation defendant, was a witness at the trial, had testified that he did not know he was working on plaintiff's ground, and that he did not order the tunnels to be caved to prevent a survey.

The affidavit and letters tended, in some slight degree, to contradict his testimony, and to that extent, and for that purpose, were admissible.

Plaintiff filed a cost bill in the case, including therein nine hundred and twenty-six dollars, as costs and expenses of a survey made by plaintiff, and for its benefit, under an order of the court. Judgment in the cause was entered August 11, 1884. On the sixteenth day of August, 1884, defendant gave notice of a motion to tax the costs, on the ground that the items, aggregating as above, are not such necessary disbursements in the action as can be legally claimed as costs by plaintiff.

On the fifteenth day of September, 1884, the court entered an order as follows: "Motion to tax costs denied. Ordered that the costs of the survey are necessary disbursements, and that the costs will, stand as taxed;" which ruling is assigned as error.

It is objected on the part of plaintiff that the order of the court refusing to strike out items from the cost bill, being a special order and made after the rendition and entry of final judgment, is an appealable order, and cannot, therefore, be reviewed except by a direct appeal therefrom. C. C. P., sec. 956; Calderwood v. Peyser, 42 Cal., 112; Clark v. Crane, 57 Cal., 633, and Dooley v. Norton, 41 Cal., 441, are relied upon in support of the position taken.

This court had previously held in Lasky v. Davis, 33 Cal., 677, that an order made on a motion to retax costs is not appealable. It is not an order made after final judgment, within the meaning of section 343 of the practice act, even though it be made after the entry of judgment, for, in legal effect, the order, if the motion is granted, amounts to a modification or amendment of the judgment, or in other words, becomes a part of it.

If the motion is denied, the error is none the less in the judgment and can be reviewed only upon an appeal from the judgment. Costs are included in and constitute a part of the judgment, and hence, though ascertained and adjudged by the court after an entry of judgment by the clerk have been made, yet the law considers such action of the court as having preceded the final judgment.

In Dooley v. Norton, 41 Cal., 441, the court reviews the previous cases on the subject, and holds that an order made on motion to retax the costs in an action is a proper subject for review in some mode in this court.

If made before the judgment is rendered it may be reached by an appeal from the judgments, but if made after the entry of judgment, it is an order after final judgment, from which as a special order an appeal will lie, thus virtually overruling Lasky v. Davis.

The reasoning in Calderwood v. Peyser, 42 Cal., 112, and Clark v. Crane, 57 Cal., 633, is in line with Dooley v. Norton.

The case of Flubacher v. Kelly, 49 Cal:, 116, though referring to Lasky v. Davis with seeming approval, was really a case in which the motion to strike out a cost bill was made before the entry of judgment, and under all the cases could only be reviewed by an appeal therefrom.

A motion to tax a cost bill is a special motion—that is, not a proceeding as of course in the cause, and an order thereon is a special order, and if made subsequent to the rendition and entry of final judgment, can only be reviewed in this court by a direct appeal therefrom.

This rule is in harmony with the letter and spirit of the code of civil procedure.

In appeals from final judgments, the statement or bill of exceptions may be framed so as to include a review of all orders prior to the entry of judgment, but as to orders made subsequent to judgment, and which may, and usually will, require a special statement, and that, too, frequently after the time for statement on appeal has expired, the inconvenience in practice of treating them as included in the appeal from final judgment will be found a serious objection, to say nothing of trenching upon the true intent of the code.

We think the objection of respondent to considering the question arising on the cost bill well taken. The judgment of the court below and the order denying defendant's motion for a new trial should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 20,094.

PEOPLE v. RICHARDS.

In Bank. Filed August 28, 1885.

CONSPIRACY—INFORMATION FOR NEED NOT BE AGAINST CONSPIRATORS JOINTLY.—An information for conspiracy is not insufficient, because it is against a single individual, and the name is given of the person with whom he is charged to have conspired.

CONSPIRACY TO ROB ANOTHER OF BANK CHECK.—A conspiracy to compel one to sign a bank check, and then to take it from him by force, is a conspiracy to rob.

APPEAL from a judgment of the superior court of Santa Clara county, entered in favor of the defendant. The opinion states the facts.

Howell C. Moore and *J. H. Campbell*, for the appellant.

Herrington & Bane, for the respondent.

MCKINSTRY, J. The superior court sustained a demurrer to an information which is in words and figures as follows:

"In the superior court, etc.

"John Richards is accused by the district attorney of the county of Santa Clara, state of California, by this information, of conspiracy, committed as follows:

"The said John Richards, on or about the ninth day of September, A. D. eighteen hundred and eighty-four, at the county and state aforesaid, did conspire with one David Davis, feloniously and by means of force and fear to take certain bank checks to and of the value of fifteen thousand dollars from the person and immediate presence of one Henry Miller, the owner thereof, against the will of Henry Miller; (and immediately theretofore and for the purpose of said taking to compel said Henry Miller, by means of force and fear, to draw, make and sign said checks) and said defendant, in pursuance of said conspiracy, and, to effect the object thereof, did, on or about the date last named, proceed from the town of Hollister, in the county of San Benito, state of California, to the city of Gilroy, in the county of Santa Clara, in said state, and did arm and disguise himself, and on the thirteenth day of September, 1884, did set forth from said city of Gilroy along the road leading therefrom to the certain place in the county last aforesaid, known as Pacheco Pass, there to lie in wait for said Henry Miller, and consummate the purpose of the said conspiracy, contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California."

From the judgment on demurrer the people appealed.

Counsel for respondent make the point: "There must be two persons, at least, charged jointly *as defendants* in every information for conspiracy." And adds: "To the general rule there is this only exception—One can only be charged or convicted of conspiracy when he is charged to have conspired with persons 'unknown,' or beyond the jurisdiction of the court."

As supporting the point, respondent cites: Penal Code, note to section 1,160; Russell on Crimes, section 492 to section 548; 2 Bishop's Criminal Law, sections 188, 189; 1 Bishop's Criminal Procedure, sections 963, 964.

The note to section 1,160 of the penal code merely lays down certain propositions, not necessarily involving the one here presented, and refers to adjudications (mentioned in the text writers or directly cited by respondent) to sustain such propositions.

We have seen no edition of Russell on Crimes divided into *sections*. In the eighth American edition of that work (Davis and Metcalf) it is said: "From the nature of conspiracy it is an offense which cannot be charged to have been committed by one person alone. And upon this ground it has been holden that a prosecution for a conspiracy cannot be maintained against a husband and wife only," etc.: Vol. 2, p. 690. No one can dispute, or has ever disputed, that the offense cannot be committed by one alone, and it would seem that the husband and wife were one, in the sense that they could not conspire without the co-operation of another, at least.

Section 189 of Bishop's Criminal Law, vol. 1, does not bear upon the point, nor does section 188 help to solve the precise question. By way of *argument*, it may be said, because one cannot commit a conspiracy or because when two are charged as defendants, the acquittal of one operates an acquittal of the other, therefore, the indictment must be against two persons, with the exceptions that one may be informed against if it be stated in the information that the other conspirator is dead, or unknown, or out of the state. The argument may be given such force, if any, as it is entitled to. But the one hundred and eighty-eighth section is cited by counsel as authority to the point that at least two *must* be charged "as defendants." It is enough to say that Mr. Bishop draws no such inference from the premises by him laid down.

Section 963 and 964 of Bishop's Criminal Procedure, vol. 1, treat of "steps where private person prosecutes," and "steps if prosecuting officer." They do not speak of conspiracy at all.

At section 464, same volume, Mr. Bishop quotes Starkie: "An indictment for conspiracy cannot charge the offense against one only, for the very nature and essence of the crime exclude the idea of its commission by a single individual. But the indictment may allege that the defendant, *together with other persons*, committed the offense." Bishop adds: "So that even here there is no legal necessity for proceeding *jointly* against the two or more conspirators." And in section 225 of the criminal procedure, vol. 2, the same learned writer very clearly intimates his opinion that upon principle, when two or more conspirators are living and within the jurisdiction, one of them may be separately indicted. He says: "The conspirators may, as of course, be jointly indicted. Nor, if they are, will the court generally direct that they be separately tried. But if one or two dies, the living one may be indicted and tried, and it is the same of a known conspirator where the other is unknown, and, probably, it is legally competent to indict known and arrested conspirators separately, while yet the court might interfere to correct so inconvenient and unusual a course." If one can be separately indicted, two being named in the indictment, as conspirators, the *indictment* is sufficient as against demurrer, whatever action the court might assume to take to prevent the practice.

In support of his point respondent's counsel also cites: I Wharton Criminal Law, section 431; Wharton's Precedents of Indictments, 607–673; Wharton's Criminal Evidence, section 393.

At section 1,388 of his criminal law, Dr. Wharton says: "A conspiracy must be by two persons at least; one cannot be convicted of it unless he has been indicted with persons to the jurors unknown." And the same learned writer employs similar language in a note to the form, number 607, inserted in his precedents. As to Wharton's Criminal Evidence, here again there is some error in the citation. Section 393 does not relate to the subject.

In a note to the statement in section 1,388, above quoted, Wharton cites 1 Hawk., c. 72, and a large number of reported decisions.

Assuming that by "Hawk., c. 72," is intended 1 Hawkins Pleas of Crown, chapter 27, it is there only laid down that, under the statute, 21 Edw. 1, one person alone cannot be guilty of conspiracy, and, therefore, no prosecution under it was maintainable against a husband and wife only: Page 448, sec. 8. Of the cases cited, Regina v. Thompson, 5 Cox, C. C., 166, only holds that where an indictment that A., B. and C. conspired together, with divers other persons to the jurors unknown, and no evidence was offered affecting other persons than A., B. and C., and the jury acquitted B. and C., but found A. guilty, *A.* was entitled to an acquittal. In Reg. v. Mulcachy, 3 H. L., 306, the defendant was indicted with five other persons. Mulcachy demurred to the indictment, because the overt acts were not properly set out. The judgment of the court was that the objection was not sufficient in law to prevent the defendant from being compelled to plead to the indictment, and the house of lords affirmed this judgment. In the course of an opinion, Mr. Justice Willes said—what is everywhere admitted—that a conspiracy is (in the absence of statutory limitations), an agreement of two or more to do an unlawful act, or a lawful act by unlawful means. There is nothing in that case to uphold the view of counsel for the respondent in the case at bar. If R. v. Denton, cited by Wharton, is Reg. v. Inhabitants of Denton, 1 Dearsleys C. C., Reserved, p. 3, it is merely to the effect that where an indictment is framed on an act of parliament, and the act is repealed after the indictment and before plea pleaded, a judgment against the defendant must be arrested. United States v. Lyman Cole *et al.*, 5 McLean, 513, was a case in which twelve persons were indicted for conspiracy with one Filley, deceased. There is no intimation in the report bearing on the question now before us.

Commonwealth v. Irwin, 8 Phila., 380, only determined that, to justify a conviction on a count charging conspiracy, the jury must be satisfied that there was an unlawful combination by the defendant with at least one other person.

In the note to section 1,388 of Wharton's Criminal Law, in which the foregoing cases are cited, reference is made to section 305 of Wharton's Criminal Pleading and Practice, where it is said: "In an indictment for conspiracy, less than two cannot possibly be joined; a wife and husband together not being sufficient. * * * But it is clear that one defendant may be tried alone, when his co-conspirators are alleged to be unknown, or when such co-conspirators are *dead*, or *absent*, or *previously convicted*." From section 305 we are referred to section 755 of the same book. There the rule is laid down, "in riot or conspiracy there cannot be a conviction of a single defendant, coupled with an acquittal of co-defendants, unless there is an allegation and proof *of the co-operation of parties not indicted*." In a note to section 305, in addition to the case of United States v. Cole, reference is given to Reg. v. Gompertz, 92 Q. B., 824; Com. v. Manson, 2 Ash., 31; State v. Sam, 2 Dev., 569, and State v. Covington, 4 Ala., 603.

In Reg. v. Gompertz, several persons were indicted together. It was held that, where all are convicted, if one shows himself entitled to a new trial on grounds not affecting the others a new trial should be granted to all.

In Com. v. Manson the action of the court in denying a separate trial to one of two persons jointly indicted for a conspiracy was approved. The State v. Tom, 2 Dev., 569, is an interesting case, because of the able and learned opinion rendered. But there, too, the actual point decided was that on an indictment for conspiracy against two the acquittal of one is the acquittal of the other. Nothing is said in the opinion which directly sustains the view contended for in the present case, that an indictment cannot be sustained wherein the single defendant is charged to have conspired with another *named person*, unless it is averred that the latter is dead or out of the jurisdiction, etc. The State v. Covington, 4 Ala., 603, only holds that where several are indicted and found guilty of a conspiracy, a motion in arrest of judgment will be entertained at the instance of any one, although the others are not in court and may have escaped from custody.

In addition to the text-books above mentioned, counsel for respondent also cites: Rex v. Kinnersley, 1 Stra., 193; State v. Egan, 10 La., 698; People v. Olcott, 1 Am. Decisions (2 Johns. Cases), 168, and State v. McDonald, 10 Am. Decisions (1 McCord), 691.

Rex v. Kinnersley decides that where two are indicted for a conspiracy, and one only appears and pleads to the issue, and is found guilty, judgment shall be given against him before the trial of the other. The Louisiana case holds that a judgment against one indicted for a riot with three co-defendants, and "divers other persons unknown," will not be arrested because his co-defendants were found "not guilty." *Non constat*, but he may have been guilty of a riot with the persons unknown.

It was held in People v. Olcott that where one of three persons, engaged in a conspiracy, died before trial and another was acquitted, the survivor might be tried and convicted.

State v. McDonald was a case where the indictment charged that McDonald and another, "together with divers other persons, to wit, to the number of five," had committed the crime of riot. A motion in arrest of judgment was made "simply on the ground that the names of the others *should have been given*, or, if unknown, that fact should have been expressly stated." In South Carolina a riot could not be committed by less than three persons, and the court sustained the objection taken to the indictment, holding, in effect, that the names of "the others" should have been given, or their names declared to be unknown. We so understand that case. It is true, the reporter states the indictment was against the defendant and *two* others, charging that they, "together with other persons," etc. But it is also stated that the grand jury found a true bill against the defendant "and *one* other only." If the statements could be construed to mean that the two indicted were charged to have committed

the riot with a third person *named*, "together with others," etc., the objection to the indictment would not have been sustained, because the name of a third person was given.

In the last case, the court said: "The names of third persons, if they are necessary to the constitution of the offense, or constitute a necessary part of its description, should, if known, be *inserted*." In a note, the compiler adds: "If several be indicted for a riot, and the jury acquit all but two, they must acquit them also, unless it be charged in the indictment that these committed the riot, together with some other person *not tried on that indictment*." (But, to prevent misapprehension, see penal code of California, 404, which makes it possible for *two* persons to create a riot.)

It has been sometimes said that if an indictment charges a conspiracy against a defendant committed with a person unknown, and the third person was in fact known, the prisoner must be acquitted: State v. McDonald, *supra;* Chitty Crim. Law, 212.

But in People v. Mather, 4 Wend., 230, it was held that if the co-conspirators are stated to be unknown, the indictment is good, even although the names of the co-conspirators must actually have been known to the grand jury.

We have endeavored to go over, carefully, all the cases cited by respondent, or by the writers to whom he has referred. Of course, it is possible that we have failed to notice isolated expressions in the opinions of judges which might be deemed to favor the view of counsel, but we are not conscious of having overlooked such expressions. In no one of the cases, however, was it decided that an indictment against one charged as a conspirator was defective because the name of the third person, with whom the defendant was charged to have conspired, was given in the indictment. If there were no precedents for an indictment, or information against one in which he was charged with another named person, the respondent would be entitled to the benefit of any inference which could fairly be drawn from that circumstance. But, when a case is only new in instance, but not new in principle, the mere failure to discover a precedent in which the principal was applied to exactly the same facts, is of little weight or consequence: Pasley v. Freeman, 3 Term R., 63; Ashby v. White, 1 Smith's Leading Cases, Hare and Ws. notes, 440, 441. And, as we have seen, the styling one as "unknown," has been held sufficient, although the name of the person was, in fact, known to the grand jury: People v. Mather, *supra*. This must be construed to be an adjudication that a grand jury is not bound to join as defendants in one indictment, all those who are known to them to have joined in the same conspiracy.

Clearly, the information states facts, assuming that the nature of the conspiracy itself is sufficiently averred, which show that the defendant has been guilty of the offense. It requires two to conspire, but, if two have conspired, each is guilty of the conspiracy. True, if the name of one is unknown, his name cannot be inserted in the indictment. But, where such person is designated as "un-

known," a particular individual is thus indicated; he is the person who is alleged to have joined with the defendant in the acts constituting the conspiracy. It is difficult to understand upon what ground the defendant can complain, if the alleged co-conspirator is more distinctly identified by giving his name. As was said, in People v. Mather: "An indictment should contain so much certainty as clearly to designate not only the particular kind of offense, but the specific criminal act for which the accused has to answer." But there and elsewhere, it has been held that the defendant was sufficiently informed of the person with whom he was accused of conspiring, when such person was charged to be *unknown*.

The alleged co-conspirator, not indicted, is a "*third person*," whose existence is necessary to the completion of the offense, and who must always be described with reasonable certainty; as in robbery, the person robbed; in larceny, the person whose property is alleged to have been stolen. In case of conspiracy, there must have been another person, without whose co-operation the defendant informed against could not have committed the crime. Such person must be identified by name, or otherwise, in such manner as that the defendant may know with what offense *he* is charged.

It may be urged that there is a species of injustice in selecting for prosecution one of two, averred to be equally guilty, when, for aught that appears, both r ight have been prosecuted. But is this a matter of which the single defendant ought to be permitted to complain? As we have seen, it has been held that where two are indicted one may be prosecuted to judgment before the trial of the other. We need not here consider the consequences in case the other shall subsequently be acquitted. We are asked to assume that both are within the jurisdiction of the court, because the information does not affirm that the conspirator died before the filing of the information, or that he had withdrawn from the state. Even if this should be conceded, we cannot see why this should relieve the defendant from pleading to an information which gives him full notice of the facts which, if they exist, establish *his* guilt of the offense.

Counsel for respondent says: "There must be two men at least *convicted* (subject to the exception as to death, etc.) before the conspiracy is established," citing 18 Cal., 83; 14 Gray, 57; Russell on Crimes, vol. 2, p. 490; Am. Dec., vol. 9, 534; Wharton's Cr. Ev., 8th ed., p. 392; Barbour's Cr. Law, p. 248.

Russell, at the page referred to, treats of "forgery." Wharton, at the page referred to, treats of the competency of the wife of one defendant to be a witness against another defendant. Dreux v. Domec., 18 Cal., 83, was an action for malicious prosecution. We are unable to see what bearing Commonwealth v. Cobb and another, 14 Gray, 57, has upon the proposition of counsel, and, except that State v. Buchanan, 9 Am. Dec., 534, was a prosecution for conspiracy, that case seems to have no relation to the proposition here asserted.

None of the cases last cited are to the point that the conspiracy cannot be established *as against the one indicted*, who is charged to have conspired with another not indicted.

Barbour in his Criminal Law, p. 248, speaks of conspiracy, but seems to add nothing to what has already been said with respect to the precise point under consideration.

In Adams v. The People, 9 Hun., 89, the indictment charged that Adams the sole defendant, "conspired with one Lamb" to defraud. Lamb had been previously convicted of the same offense, but this did not appear on the face of the indictment, but was only shown as a fact when Lamb was offered as a witness for the prosecution. The court held him competent as he had been convicted of a misdemeanor, not of a felony. Adams was separately indicted, tried and convicted. No objection was taken to the indictment by demurrer or in arrest of judgment.

We are not, however, without the authority of adjudications directly sustaining the course pursued by the district attorney in the present case. In Heine v. Commonwealth, 91 Penn. St., 145, Heine was charged with having "with one Henry Weile conspired" etc. The objection was taken that Heine alone was charged. The court said it is strictly true that a conspiracy is in its nature joint, and that one alone cannot be guilty of the offense: "Nevertheless one of two or more conspirators may be separately indicted, tried and convicted: 3 Chitty's Cr. Law, section 1,141. Therefore, that Weile has not been indicted with Heine can make no difference, if it sufficiently appears from the record that he was a confederate."

In United States v. Miller, 3 Hughes, C. C., 553, the information charged a conspiracy by three persons, Miller, Lee and Gettslick. Lee was dead, and Gettslick was already under conviction "for an act committed in furtherance of the conspiracy charged." The learned judge said: "It is not the practice of the government to prosecute any person to conviction for more than one of the same *series of offenses*. Hence *there is no indictment here* except against Miller. * * * The particular question arising on demurrer, therefore, is, will an information against him alone lie without joining Gettslick. * * * As there may thus be a severance in the trial, in the verdict and in the judgment, we may conclude there may also be a severance in an indictment for a conspiracy, unless there be some reason peculiar to such an indictment plainly making the several proceedings improper. I can see no such reason. It will not do to say that because two at least must be convicted of a conspiracy, and that one person who should be the only one convicted must be discharged, therefore two at least must be joined in the indictment. But that same reasoning would forbid the severance of the trial, and deprive any one of his right to be tried alone. If it be conceded that there may be a severance in the trial of persons jointly indicted for a conspiracy, it follows, as far as the reason just alluded to is concerned, that there may likewise be a severance in the indictment. Some of the text writers say (*arbitrarily*) that indictments

for conspiracy must be joint; but they give no reason, other than the one just stated, for their proposition, and it is difficult to find a reason. I do not think any sufficient reason exists."

The learned judge then proceeds to examine United States v. Cole, People v. Mathew, Rex v. Kinnersley, and Rex v. Nichols, 13 East., 412. He finds nothing in those cases which would prohibit the indictment of one of two known conspirators.

Our conclusion upon the point is, that the information is not insufficient because it is against a single defendant and the *name* is given of the person with whom he is charged to have conspired.

In addition to the objections above considered, respondent claims that no crime is charged, inasmuch as a conspiracy to compel one to sign a bank check and then to take it from him by force, is not "a conspiracy to rob." "Robbery is the taking of personal property from the person of another by means of force:" Penal code, section 211. "Personal property" includes things in action and evidences of debt: Penal code, sec. 7. It is a *conspiracy* to rob, even although the conspiracy include an agreement to compel the making of the checks which are to be taken by force from the person. It is part of the unlawful agreement that a robbery shall be accomplished.

Judgment reversed and cause remanded, with direction to the court below to overrule the demurrer and to require the defendant to plead to the indictment.

MYRICK, J., ROSS, J., THORNTON, J., and MORRISON, C. J., concurred.

MCKEE, J. I concur in the judgment.

No. 9,349.

WILSON v. BARNARD ET AL.

In Bank Filed August 28, 1885.

LOGGER'S LIEN—COMPLAINT MUST ALLEGE AMOUNT DUE TO ORIGINAL CONTRACTOR.—The complaint in an act to enforce a lien alleged to have accrued under and by virtue of the act of March 30, 1878, entitled "an act giving a lien to loggers and laborers employed in logging camps, upon the logs cut and hauled by persons who employed them," does not state a cause of action, unless it be alleged that something was due from defendants to the original contractor when plaintiff's lien was filed, or that defendants were notified or had knowledge of the claim of plaintiff prior to the payment in full of the amount due to the original contractor under the contract.

APPEAL from a judgment of the superior court of Butte county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

Gray & Sexton, for the appellants.

Gale & Jones, for the respondent.

ROSS, J. This action was brought to enforce a lien alleged to have accrued under and by virtue of the provisions of the act approved March 30, 1878, entitled: "An act giving a lien to loggers and laborers employed in logging camps, upon the logs cut and

hauled by the persons who employ them," as amended by the act approved April 12, 1880: Statutes 1877–8, 747; Statutes 1880, 38.

The first point made for the appellant, which, we think, must be sustained, is that the complaint does not state facts sufficient to constitute a cause of action. In Rosenkranz v. Wagner, 62 Cal., 151, and in other cases in this court, it was held that because of the failure of the complaint to allege that anything was due from defendants to the original contractor when plaintiff's lien was filed, or that defendants were notified, or had any knowledge of the claim of plaintiff, prior to the payment in full of the amount due to the original contractor, under the contract, that there was a failure to state a cause of action. But it is contended, on behalf of the respondent, that the decisions under the mechanic's lien act are inapplicable to cases arising under the logger's lien act, because by the latter act it is provided that the liens given, "shall take precedence of other claims" for the period of thirty days after the logs or lumber arrive at the place of destination, etc. But, manifestly, the giving of precedence of one class of liens over all other claims, does not extend the liability of the party against whom all of the liens and claims go; that is to say, the owner of the property sought to be charged. The contracts of material-men and laborers, with the original contractor are made with reference to his contract with the owner, and in subordination to its terms: Dingley v. Green, 54 Cal., 336. It results that the owner cannot be charged beyond the contract price: Latson v. Nelson, 11 P. C. L. J., 589; Whittier v. Hollister, 12 Id., 280. In the brief of counsel for plaintiff, it is said that Barnard & Co., who were the contractors, and who employed the plaintiff to work, "were converting trees, on appellant's land, into lumber, and, after transporting, scaling, measuring and marking the same, would, if quality and all things were satisfactory to appellant, receive an agreed price per thousand feet;" and that plaintiff's lien was filed against certain lumber prior to its delivery, and prior to the payment by appellant of the agreed price therefor. The *complaint* contains no such averment with respect to payment, for which reason the demurrer thereto should have been sustained.

Judgment and order reversed, and cause remanded, with directions to the court below to sustain the demurrer to the amended complaint, with leave to the plaintiff to amend further.

MYRICK, J., THORNTON, J., MORRISON, C. J., and MCKINSTRY, J., concurred.

MCKEE, J., DISSENTING. I dissent. The action is an attachment suit for recovery of the value of personal services rendered by the plaintiff in cutting standing timber upon land claimed by the defendant, Farnham, and in hauling and driving saw logs and lumber from the land to his saw mills, and to foreclose a logger's lien.

The lien was filed upon a quantity of lumber which the plaintiff had "cut, sawed, hauled and driven" to a saw mill on the land of Farnham. This lumber had been cut, etc., by the plaintiff for and

under the directions of the defendants, Barnard & Co., who had a contract with the defendant Farnham, under which they were authorized to enter upon Farnham's land and cut the standing timber thereon, for the purpose of converting the same into lumber, which, when "scaled, marked and measured," Farnham agreed to purchase from them, at a certain price per thousand feet, payable when the lumber was delivered "scaled, marked and measured," to him at his saw mills upon his ranch.

In the execution of the contract Barnard & Co. hired the plaintiff as a "logger," but they failed and refused to pay him his wages, which amounted to several hundred dollars; and, as security for the payment of what was owing to him, he filed a logger's lien upon the lumber at the loggers' yards on Farnham's ranch, where it lay unscaled, unmarked, unmeasured and undelivered; and, seasonably, after the filing of the lien, he commenced his attachment suit.

The lien was filed and the attachment suit commenced under the provisions of an act of the legislature approved March 20, 1878, entitled "an act giving a lien to loggers and laborers." Section 1 of the act reads as follows:

"A person who labors at cutting, hauling, rafting, or drawing logs or lumber, shall have a lien thereon for the amount due for his personal services, which shall take precedence of all other claims, to continue for thirty days after the logs or lumber arrive at the place of destination for sale or manufacture," etc.

It is not claimed that this statute is unconstitutional; nor is it claimed that any of the steps taken by the plaintiff for the creatino of the lien is contrary to the requirements of the statute. But, conceding all these, the contention is made, that as Farnham did not owe Barnard & Co. any money, on account of the contract under which the lumber was made, at the time of the filing of the lien, the plaintiff had no lien to be enforced.

A "logger's lien" is an entirely different thing from a "mechanic's lien." The latter is given by statutory law upon real property, of which the person for whom the improvement is made is, or claims to be, the absolute owner; and, as he contracts under the mechanic's lien law, which enters into his contract, for the improvement of his property, he is bound, to the extent and according to the terms of his contract, and his property is charged for the payment of the indebtedness contracted to the several parties who, under the law, have rights in it; and he can do no act to impair those rights; therefore, he is not bound to pay, unless there is money due and owing at the time of availing of those rights. Such were the cases of Rosenkranz v. Waggoner, Dingley v. Green, Latson v. Nelson and Whittier v. Hollister, cited in the prevailing opinion.

Here, however, there is no lien claimed, or sought to be enforced, upon the real property of Farnham. It is a lien upon personal property, in which Barnard & Co. had an absolute or qualified ownership; and, for the purpose of the logger's law and lien, it matters not whether they were absolute or qualified owners—they were

the owners of the property; and by the terms of the contract between them and Farnham, Farnham merely reserved to himself, as a preferred purchaser, the right to buy from them, at a stipulated price, when the lumber was delivered at his saw-mills, scaled, marked and measured. But the lumber was not scaled, nor marked, nor measured, nor delivered to Farnham. Farnham, therefore, had neither possession of it, nor title to it. The lumber was in the actual or constructive possession of Barnard & Co., and the plaintiff, who had expended his labor upon it. A constructive possession is sufficient for a logger's lien; therefore, the plaintiff, in my judgment, had an unquestionable right to create and perfect a lien upon the lumber, whether Farnham was, or was not, indebted to Barnard & Co. at the time.

The right to such a lien does not depend upon an indebtedness by the owner of land to persons whom he has authorized to cut and remove timber growing upon it, and to manufacture the same into lumber, by a special contract for that purpose. It rests upon property in the debtor, and possession, actual or constructive, in the lienor. The statute authorizing the lien to be created and filed is but the legislative expression of the common law right of every workingman to retain possession of personal property upon which he has bestowed labor, which has changed the property and increased its value. Having possession, actual or constructive, the artisan or laborer has the right to retain it, or to create a lien upon it, according to the statute, without reference to any contractual relation between his employer and others as to the property. Any claims arising out of such relations are made, by the statute, subordinate to the superior claim and right of the laborer to his lien upon the property for the services which have made it valuable.

I think the judgment of the court for the enforcement of the lien should be affirmed.

No. 11,052.

EEL RIVER AND EUREKA R. R. CO. *v.* FIELD.

In Bank. Filed August 28, 1885.

EMINENT DOMAIN—ROUTE FOR RAILROAD—RIGHT OF WAY.—A railroad corporation has the power, in eminent domain proceedings, to acquire a right of way for its road, in accordance with the most advantageous route. And the mere fact that it had, after its preliminary survey, acquired a right of way over another portion of defendant's land, over which it might, though at less advantage, build its road, does not render the taking unnecessary.

APPEAL from a judgment of the superior court of Humboldt county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

S. M. Buck, for the appellant.

W. H. Brumfield, for the respondent.

ROSS, J. The plaintiff, a corporation organized under the laws of this state for the purpose of building and operating a railroad

from a point on the Van Duzen river to the city of Eureka, in Humboldt county, seeks by this proceeding to condemn a right of way for its road over the land of defendant. The answer of defendant put in issue the alleged necessity for taking the land in question, and upon this issue the Court below found in favor of defendant, and accordingly gave judgment against the plaintiff. It is contended here that the evidence is insufficient to sustain the finding.

It appears that one R. F. Herrick, at the instance of the plaintiff, made a preliminary survey for the line of its road through that portion of the land of the defendant described as "west of the dyke," and defendant sold to the plaintiff a right of way four rods in width for its road over that part of his land, "granting to said company the right to pass and re-pass with its rolling stock, freight and passenger cars, to construct and maintain side tracks, switches, turntables and warehouses; the said grant of right of way to continue and be in force so long as the said company shall continue to maintain and operate its road, and no longer." But the line of the road, as finally located, ran through another portion of defendant's land, and it is over that portion of the land embraced in the line as finally located that the plaintiff seeks to acquire the right of way by means of these condemnation proceedings. The plaintiff's engineer testified at the trial that "it was necessary to locate the line as described in the complaint herein across the defendant's land, because it is the best line, the most economical to construct, and the most practical route for running a line through that land. It is the shortest line; it has less curvature than any other line, and the road being a very important one (may be a through line), it is necessary to consider very carefully the best line to be run through defendant's land."

The engineer who ran the preliminary line testified: "The difference between the line described in the complaint and the one I surveyed consisted in this: The one I surveyed west of the dyke was of greater length, had a very short curve; there may be considerable difference in cost of two routes as the line in the complaint described is high enough to avoid the necessity of throwing up an embankment. I could not say what the difference in cost would be. The route they have located is the shortest, still the other route would accomodate their business, and it looks to me better than the one they seek now. It is nearer their landing."

The testimony of the witness F. E. Herrick is of but little consequence as he admitted that he had made no survey of the routes, but that his examination was confined to the map and his experience in railroad building was confined to two logging roads, one a quarter of a mile and the other one mile in length.

The basis of the action of the court below in finding that the land in question was not necessary to be taken for the purposes of the road, was the fact that the plaintiff had previously acquired and still held by purchase a right of way across defendant's land west of the dyke "which will enable the plaintiff to accomplish the object

for which it is incorporated and discharge every duty it owes to the public."

By section 465 of the civil code it is declared that:

"Every railroad corporation has power:

"1.—To cause such examination and surveys to be made as may be necessary to the selection of the most advantageous route for the railroad; and for such purposes their officers, agents and employees may enter upon the lands or waters of any person, subject to liability for all damages which they do thereto; * * *

"4.—To lay out its road, not exceeding nine rods wide, and to construct and maintain the same, with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same; * * *

"7—To purchase land * * * to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts, or acquire them in the manner provided in title vii., part iii., code of civil procedure, for the condemnation of lands; and to change the line of its road, in whole or in part, whenever a majority of the directors so determine, as provided hereinafter; but no such change must vary the general route of such road, as contemplated in its articles of incorporation." * * *

The next section provides:

"Every railroad corporation in this state must, within a reasonable time after its road is finally located, cause to be made a map and profile thereof, and of the land required for the use thereof, and the boundaries of the several counties through which the road may run, and file the same in the office of the secretary of state," etc.

By section 467 it is provided: "If at any time after the location of the line of the railroad and the filing of the maps and profiles thereof, as provided in the preceding section, it appears that the location can be improved, the directors may, as provided in subdivision 7, section 465, alter or change the same, and cause new maps and profiles to be filed, showing such changes, in the same offices where the originals are of file, and may proceed in the same manner as the original location was acquired, to acquire and take possession of such new line, and must sell or relinquish the lands owned by them for the original location within five years after such change. No new location as herein provided must be so run as to avoid any points named in their articles of incorporation."

It will be observed that by the provisions of the last section that even after the line is once finally located and the map filed as required by section 466, if it appears that the location can be improved the directors may, in accordance with the provisions cited, alter or change the route and may proceed, in the same manner as the original location was acquired, to acquire and take possession of such new line, being required to sell or relinquish the lands owned by them for the original location, within five years after such change. But here the effort is to condemn land embraced within the line as

first finally located and as shown by the map filed by the plaintiff in accordance with the provisions of section 466 of the civil code. There is no substantial conflict in the evidence upon the proposition that the line as finally located and within which the land sought to be taken falls, is the shortest, best and most economical, and, therefore, the most practicable route. The mere fact that the plaintiff had, after its preliminary survey, acquired a right of way over another portion of defendant's land over which it might, though at less advantage, build its road, does not render the taking unnecessary; for as has been seen, railroads are, under our statute, empowered to alter or change their route even when once finally located, whenever the location can be improved. In the present case the right of way granted the plaintiff by defendant was conditional, and, by the terms of the deed, will cease to exist when plaintiff's road is constructed elsewhere.

We are of opinion that the evidence is insufficient to sustain the finding of the court below.

Judgment and order reversed and cause remanded for a new trial.

MYRICK, J., MORRISON, C. J., THORNTON, J., MCKEE, J., and MCKINSTRY, J., concurred.

No. 20,087.

PEOPLE v. LANGTON.

In Bank. Filed August 28, 1885.

MURDER—INSTRUCTIONS—INTENTION PRESUMED FROM ACT.—In a prosecution for murder an instruction that "every person is presumed to intend what his acts indicate his intention to have been; and if the defendant fired a loaded pistol at the deceased and killed him, the law presumes that the defendant intended to kill the deceased; and unless the defendant can show that his intention was other than his act indicated, the law will not hold him guiltless," is not erroneous. The words "unless the defendant can show" cannot be construed as requiring the defendant to show, by evidence adduced by himself, what his intention was.

THE SAME—DRUNKENNESS OF DEFENDANT.—As between murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry, for manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation.

APPEAL from a judgment of the superior court of Sierra county, entered upon a verdict convicting the defendant of murder in the second degree, and from an order refusing him a new trial. The opinion states the facts.

Van Clief & Herron, for the appellant.

E. C. Marshall, attorney general, for the respondent.

MORRISON, C. J. Defendent was prosecuted for the crime of murder and was convicted of murder in the second degree. On the trial of the case in the court below, the following instruction was given to the jury:

"Every person is presumed to intend what his acts indicate his intention to have been; and if the defendant fired a loaded pistol at the deceased and killed him, the law presumes that the defendant

intended to kill the deceased; and unless the defendant can show that his intention was other than his act indicated, the law will not hold him guiltless."

"Unless the defendant can show that his intention was other than his acts indicated, the law will not hold him guiltless," is the portion of the instruction which struck us at first view as erroneous. It might be claimed that the defendant was required to show, by evidence adduced by himself, what his intention was, even though the fact appeared, from evidence introduced by the prosecution, that there were circumstances of mitigation or facts which reduced the crime as provided by section 1,105 of the penal code. But, on reflection, we have concluded that such is not the proper meaning of the instruction. The words, "unless the defendant can show," mean unless he can or does show from the whole evidence in the case, thus bringing himself within the meaning of the above section of the code. It would be a strained construction of the language of the instruction to hold that the court meant or intended the jury to understand that the evidence must come from the defendant, and that they could not consider the whole evidence in the case, as showing circumstances of mitigation, or facts tending to reduce the degree of the crime, or even to excuse or justify the same.

The appellant also complains of the second instruction, which is as follows: "As between murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry, for manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation," etc.

But is it true that drunkenness does form a legitimate matter of inquiry as between murder in the second degree and manslaughter? The trial court told the jury that it did not. The question is not a new one in this court. In the case of People v. Nichol, 34 Cal., 215, the court below, charging the jury in a case of homicide, said: "As between murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry, for manslaughter is the unlawful killing of a human being without malice, express or implied, and without any admixture of deliberation." The defendant was convicted, and the judgment was affirmed by the supreme court. The instructions were quite numerous, including the one referred to, and, speaking of them, Judge Sanderson, delivering the opinion of the court, said: "They are not even obnoxious to criticism." In the case of Pirtle v. The State, 9 Humph., 663, the supreme court of Tennessee says: "As between the two offenses of murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry; the killing being voluntary, the offense is necessarily murder in the second degree, unless the provocation was of such a character as would at common law constitute it manslaughter, and for which latter offense a drunken man is equally responsible as a sober one." The case named is cited with approval by the supreme court in People

v. Belencia, 21 Cal., 346, and the instruction in the case we are now considering is fully sustained by these authorities.

We find nothing in the record which calls for a reversal of the judgment, and, therefore, the same is affirmed, as is also the order denying a new trial.

MYRICK, J., ROSS, J., and THORNTON, concurred.

No. 9,894.

WHITESIDES ET AL., EXECUTRICES, ETC., v. BRIGGS, EXECUTRIX, ET AL.

Department Two. Filed August 28, 1885.

WHERE THE EVIDENCE IS SUBSTANTIALLY CONFLICTING, the judgment will not be reversed for insufficiency of the evidence to justify the decision.

FINDINGS UPON PROBATIVE MATTERS, OUTSIDE OF THE ISSUES, is no reason for reversing the judgment, when the findings cover all the issues.

THE COMPLAINT HELD TO STATE FACTS SUFFICIENT to constitute a cause of action.

APPEAL from a judgment of the superior court of Los Angeles county, entered in favor of the plaintiffs, and from an order denying the defendants a new trial. The opinion states the facts.

Godfrey & O'Melveney, for the appellants.

Hazard, Thorn & Hinton, for the respondents.

BELCHER, C. C. This is an action to set aside a deed to a lot in the city of Los Angeles, upon the ground that it was obtained by fraudulent misrepresentation.

The defendants interposed a general demurrer to the complaint which was overruled, and then filed separate answers.

The case was tried and findings and judgment entered in favor of the plaintiffs.

The appeal is from the judgment and an order denying a new trial.

1. There was no error in overruling the demurrer. The complaint stated facts sufficient to constitute a cause of action, and was certainly good when tested by a general demurrer.

2. The findings are very full and cover all the material issues. The fact that there were findings upon probative matters, outside of the issues, is no reason for reversing the judgment.

3. A careful reading of the transcript has satisfied us that there was testimony tending to support all of the findings.

No useful purpose would be subserved by stating the testimony here. On many points it was conflicting, but when there is a substantial conflict this court never reverses judgments upon the ground that the evidence was insufficient to justify the decision.

We think the judgment and order should be affirmed.

FOOTE, C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 7,204.

DORLAND v. BERNAL.

Department Two. Filed August 28, 1885.

REMITTITUR—MOTION TO RECALL—REVIEW OF ERRORS.—Alleged errors of the lower court, made in proceedings had since the remittitur went down, cannot be examined and corrected in the supreme court, on a motion to recall the remittitur.

MOTION to recall a remittitur. The opinion states the facts.

J. M. Wood, for the petitioner.

Chas. H. Parker, for the respondent.

THE COURT. This is a motion to recall a remittitur to the end that the proceedings of the court below, had since the remittitur went down, may be examined, and certain alleged errors corrected. If any errors have been committed, the way proposed by the mover is not the proper way for reaching them.

Motion denied.

No. 9,717.

CITY OF LOS ANGELES *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

Department Two. Filed August 29, 1885.

ORDINANCES OF LOS ANGELES—EXEMPTION OF DEFENDANT FROM TAXATION.—Upon a review of certain ordinances of the city of Los Angeles, and a certain contract made between it and the defendant, held that the same did not constitute a contract that the business of the defendant when established and prosecuted, or its property, were to be free from the burdens of taxation, or exempt from such license tax as might be lawfully imposed other upon persons owning like property and using it in like manner.

APPEAL from a judgment of the superior court of Los Angeles county, entered in favor of the plaintiff and from an order denying the defendant a new trial. The opinion states the facts.

Glassell, Smith & Patton, for the appellant.

W. D. Stephenson, for the respondent.

SEARLS, C. This action was brought to recover twelve hundred and twenty dollars alleged to be due for license tax. Plaintiff had judgment. Appellant does not here challenge the authority of plaintiff to provide by ordinance for the collection of a license tax upon business and occupations carried on within the corporate limits of the city of Los Angeles, including such license tax, "for every steam railroad company having depot in said city."

The validity of the ordinance upon which this action is founded was passed upon in case of City of Los Angeles v. Southern Pacific Railroad Company, 61 Cal., 59.

The points made here, and which, it is claimed, were not involved in the case quoted above, are:

1. That by virtue of an ordinance of the city of Los Angeles, approved October 24, 1872, an ordinance of the board of supervisors of Los Angeles county, and an agreement of defendant therein

referred to, and certain other ordinances relating to the same subject matter, a contract between the parties, plaintiff and defendant, was created, by the express terms of which it became the duty and right of defendant to establish its depot, and to maintain and operate its railroad in and through the city, and that the subsequent deed and ordinances of the city relating thereto, constituted an express grant to the defendant of the right to maintain its depot and operate its road without any further license from the city.

2. That the ordinance imposing a license upon the defendant is in contravention of the terms of this contract, and impairs its obligation, and is therefore void as againt defendant.

From a review of the findings of the court below, and of the evidence upon which those findings are based, we conclude the city of Los Angeles and the county of Los Angeles were alike desirous that the defendant corporation should construct its railroad through the county and locate its depot and shops within the city limits, and that as an inducement thereto they and each of them were willing to make, and did make, concessions in the way of bonds and stock, and that the plaintiff granted certain lands needed by the corporation defendant, and granted to it free "any and all right of way which said Southern Pacific Railroad Company may require in entering, passing through and leaving the said city with the main trunk line, be secured to them free of any claim for damages or other compensation."

The court below finds that "the plaintiff, for a valuable consideration rendered by the defendant, granted to the defendant the right to construct its road, depots, workshops, in said city, and to operate the same and to carry on its business connected with said road and depots in said city; but by virtue of said ordinances and contract the defendant has not the free nor unrestricted right to operate its said roads, depots or workshops or carry on its said business within said city, free from any tax, license or other impositions from said city."

This further fact is found: "The court further finds that there was no consideration paid, or contracted to be paid by the defendant to the county or city, or either of them, to the plaintiff for exemption from taxation."

If there is anything in the evidence which can be said to militate against the two findings above set out, it must be found in the ordinance which provides that in consideration of the benefits and advantages conferred upon and derived by the city by the location of the passenger and freight depots for the Los Angeles city station of the main trunk line of the Southern Pacific Railroad within said city, etc., the city assigns certain stock to the defendant, and at the same time provides that the defendant shall not as a consideration for such stock be required to locate and build its depots and run the road to the same unless there shall be deeded to the company certain lands for depot purposes and certain other land for workshops and other buildings.

Or in the ordinance approved July 26, 1873, entitled:

"An ordinance providing a free right of way for the Southern Pacific Railroad through the city of Los Angeles."

The ordinance, after reciting that by a certain ordinance passed October 24, 1872, the city was obligated to give to defendant a free right of way through the city for its road, and that the defendant had selected certain streets, proceeds to set apart and dedicate to the unreserved and unrestricted use of defendant such streets, for a right of way and to grant to defendant the right of way over the same, for the uses and purposes of its road, etc.

We fail to find, in this testimony, any conflict with the facts as found by the court.

The city was the owner, as we suppose, of certain lands and personal property, which it was willing to convey to defendant, provided it would build its road through the city and build its depot and workshops therein, and the former was also willing, as a further inducement, to grant a right of way through the city to defendants for its road, free from all expense or damage.

It does not follow that the business of the defendant, when established and prosecuted, or its property, were to be free from the burdens of taxation or exempt from such license tax as might lawfully be imposed upon other persons owning like property and using it in like manner.

There was a contract between plaintiff and defendant. It related to the manner of acquiring certain property and easements.

It did not, however, confer upon the grantee any rights, privileges, exemptions or immunities in the ownership or use of the property to which it would not have been entitled, had it purchased the same property, at private sale, from an ordinary citizen, or condemned and paid for it, under the right of eminent domain.

The case of the City of Los Angeles v. The Los Angeles Water Company, 61 Cal., 65, is not in point.

There the plaintiff entered into an agreement with the predecessors in interest of the defendant, by which, for an annual rent, reserved, and other considerations, defendant, the holder of a lease of plaintiff's water-works as assignee, had a right to sell and distribute water for domestic purposes, and to receive the rents and profits to its own use.

The right to sell water, and carry on the business of selling and distributing water for profit, was granted by plaintiff, and an ordinance imposing a license tax upon all persons vending water for domestic purposes was held invalid against defendant upon the ground that plaintiff, under its contract, had already reserved a sum to be paid by defendant for the privilege of vending water for domestic purposes, and could not, during the term of the lease, increase the amount to be paid for the privilege granted.

The present case differs from that, in this—there, plaintiff had received a consideration for a *privilege granted*—here, no privilege had

been granted to carry on a business, and no compensation had been received for any such grant.

Plaintiff had granted a right of way, and conveyed certain property, as any private owner of such property might have done, nothing more.

This did not, as we think, constitute such an express grant to defendant of the right to operate its road as to exclude it from liability to a license tax in common with others engaged in a like pursuit.

It follows that the ordinance imposing a license upon defendant, is not obnoxious to the charge of being in violation of a contract.

By this reasoning, we do not mean to imply that it is in the power of a municipal corporation, by a contract concerning its property, to divest itself of any of its governmental functions.

We are of opinion the judgment and order appealed from should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 9,630.

GWINN, ADMINISTRATOR v. HAMILTON, ADMINISTRATOR.

Department One. Filed August 29, 1885.

OPEN ACCOUNT—ACTION ON—ITEMS ACCRUING WITHIN PAST TWO YEARS.—In an action on an account, not reciprocal in its demands, the plaintiff can only recover for items which accrued within the last two years prior to the commencement of suit.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Ball & Craig and *Beatty & Denson*, for the appellant.

Henry Edgerton and *Add C. Hinkson*, for the respondent.

FOOTE, C. Action on "an open, mutual and current account."

The account sued on was not reciprocal in its demands, and is not within the provisions of section 344, code of civil procedure.

All that the plaintiff was entitled to recover were the charges made for the last two years of Belden Gwinn's service as a man of all work in his father's employ.

We perceive no further error on the part of the court in the case.

The judgment and order should be reversed and the cause remanded.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded.

No. 9,865.

WENZEL v. COMMERCIAL INSURANCE COMPANY OF CALIFORNIA.

Department Two. Filed August 29, 1885.

FIRE INSURANCE—BREACH OF CONDITION AVOIDS POLICY.—A breach of any one of the conditions contained in a policy of fire insurance, on the part of the assured, is a good defense to his right of recovery.

THE SAME—EMPLOYMENT OF WATCHMAN—BREACH OF CONDITION.—A policy of insurance, on a quartz mill, contained a condition that "a watchman shall be employed by the assured to guard the premises during such time as the mill is idle." The person claimed to have been employed as a watchman worked in his own mine, twenty-two hundred feet distant from the mill, for six or seven hours during the day; at night he slept in a house nine hundred feet from the mill, between which house and the mill a hill intervened, which prevented him from seeing the mill. The mill was burned at night, without the knowledge of the so-called watchman. *Held*, that the condition of the policy was not complied with.

THE SAME—CHANGE OF POSSESSION—LEASE OF PROPERTY INSURED.—A condition in such policy, that any change in possession, without the written assent of the company, shall render the policy void, is broken, if the assured, without obtaining such assent, leases the property assured, and surrenders the possession to another.

APPEAL from a judgment of the superior court of Tuolumne county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

R. B. Wallace, for the appellant.

Street & Street, for the respondent.

MORRISON, C. J. This is an action on a policy of insurance issued by defendant to plaintiff on the seventh day of October, 1881, by the terms of which, in consideration of a certain premium paid the former by the latter, defendant insured the plaintiff, for the term of one year, on his certain quartz mill, situated in the county of Tuolumne, and on other property in the policy enumerated, against loss by fire.

Among the conditions contained in the policy are the following: "It is understood and agreed that a watchman shall be employed by the assured to guard the premises during such time as the mill is idle. * * * Any false representation by the assured of the condition of the property * * * or any over-valuation thereof * * * or any false or fraudulent representation to the authorities touching the property hereby insured * * * or any change in the possession without the written assent of the company, shall render the policy void." These are the important conditions affecting the policy which it is material to consider in this case, and all of which, it is claimed by the company, have been violated and disregarded by the plaintiff. The mill was destroyed by fire on the second of August, 1882, and within the time covered by the policy of insurance.

The company refused to pay the loss incurred, and this action was brought to recover the same of the company. Plaintiff had judgment in the court below. Appellant moved for a new trial, which was denied by the court, and the appeal is from the judgment as well as the order denying the motion for a new trial. At the time of his application for insurance, the plaintiff represented

to one Deickman, the agent of the company, that the property covered by the policy was of the value of twelve thousand dollars, and the defendant, believing such representation to be true, insured the property on the basis of a valuation thereof at twelve thousand dollars. This is the fourth finding of the court. The court further finds, in the same finding, "that the property was of no greater value than between eight and nine thousand dollars, but the plaintiff did not intentionally deceive Deickman, the agent of the defendant, but, on the contrary, the plaintiff estimated the property at its cost, which was the sum of twelve thousand dollars." How far did this false representation of value, although not made fraudulently, affect the validity of the contract? Was it a breach of a condition of the policy?

Another important fact in the case appears clearly from the evidence that the insured reported to the authorities in giving in this property for assessment, that its value was only five hundred dollars and on that amount only he paid taxes on the property for the fiscal year 1881 and 1882.

Another point made on behalf of the defense is, that the policy contained a condition to the effect that a watchman should be employed by the insured to guard the premises during such time as the mill should be idle. Was that condition kept and observed by the plaintiff? The sixth finding is, "that during the space of five weeks, immediately prior to the sixteenth day of October, 1881, said quartz mill was continuously in operation crushing ore from the Lynch quartz mine; that, thereafter, said mill was idle until June, 1882; that it was idle from on or about the first day of July, 1882, to the second of August, 1882, at which time said mill was destroyed by fire, and that it was idle at the time of its destruction."

By the thirteenth finding, the court finds that one Lynch was employed to watch and guard the mill, and appellant's counsel makes the point that this is not a finding that Lynch was employed as a *watchman* of the premises. However this may be, it is apparent from the uncontradicted evidence in the case, that Lynch was not employed as a watchman of the premises, within the sense and meaning of the contract. It appears that Lynch was working in his own mine, twenty-two hundred feet distant from the mill, for six or seven hours during the day, and that at night he slept in a house nine hundred feet from the mill, between which house, and the mill, a hill intervened, which prevented this so-called watchman from seeing the mill. The mill was burned and destroyed without waking Lynch, and the first intimation he had of the destruction of the property, was in the morning after the fire. He was too far away from the property during the hours of the night, when it most required watching, to be of any use whatever, as a watchman on the premises. A watchman, according to Webster, is a sentinel, and a watchman of a building is one who takes care of it during the night time. There are other reasons apparent from the evidence in the case for holding that the conditions of the contract for a watchman on the

premises were not kept by the insured, but we have confined ourselves to the *undisputed* facts of the case.

Another point made by the appellant, is that the condition of the policy in regard to a change in the possession of the property, was broken by the insured. In the ninth finding, it is found by the court, as a fact in the case, that on the seventeenth day of January, 1882, the plaintiff and others, without the consent of the defendant, leased the property insured and surrendered the possession thereof to Joseph Hoskins and his associates. This was a breach of a condition in the policy which rendered the same void according to the express language thereof.

We are of opinion that according to the findings of the court, and the uncontradicted evidence in the case, the plaintiff was not entitled to judgment. A breach of any one of the conditions contained in the policy was a fatal breach on the part of the assured, and a good defense to his right of recovery: Sections 2,607, 2,612, civil code.

We cite the following authorities as bearing on the points decided in this case: Gladding v. Ins. Co., 4 W. C. Rep., 106; May on Insurance, sections 156, 157; Ripley v. Ins. Co., 30 N. Y., 162; Civil code, section 2,611.

Judgment and order reversed.

SHARPSTEIN, J., concurred.

THORNTON, J. I concur in the judgment.

No. 20,130.

HINES *v.* ROADHOUSE, JUSTICE OF THE PEACE, AND THE SUPERIOR COURT, ETC.

Department One. Filed August 29, 1885.

WRIT OF REVIEW—JURISDICTION.—A writ of review does not lie to review the action of a court, in a proceeding in which it had acquired jurisdiction.

APPLICATION for a writ of review The petitioner was convicted and fined in a justice's court, for keeping a house of ill-fame. On appeal to the superior court the judgment was affirmed.

Geil & Morehouse, for the petitioner.

THE COURT. The petition for a writ of review, on its face, shows that the superior court and the justice of the peace had jurisdiction to render the judgments severally sought to be annulled.

Writ denied and petition dismissed.

No. 20,071.

PEOPLE v. FRENCH.

In Bank. Filed August 29, 1885.

MURDER—DUTY OF JURY AS TO FIXING PUNISHMENT—INSTRUCTIONS.—In a prosecution for murder, the jury, after agreeing to find the defendant guilty of murder in the first degree, were unable to agree upon the punishment; they, thereupon, came into court, and the judge instructed them that they had the right to fix the penalty at death, or imprisonment for life, or to bring in a verdict of guilty of murder in the first degree, without specifying the penalty; the jury subsequently returned for further instructions, when the court charged them: "If there is nothing specified in your verdict as to the penalty, the court will have its duty to perform, but what the duty will be, the court will not say." *Held*, that the instructions were without error; that the jury could not have been misled by the failure of the court to inform them that its duty would be to sentence the defendant to death, if the verdict did not fix the penalty.

THE SAME—EVIDENCE AFFECTING CREDIBILITY OF WITNESS.—In such case, where a witness for the defendant is cross-examined as to a conversation had by him, for the purpose of affecting his credibility, if the defendant understood that such evidence was admitted on any other ground, or was apprehensive that it might be used for any other purpose in the case, he should ask the court, by a proper instruction, to limit it to the question of the credibility of the witness.

THE SAME—MEANING OF WORDS USED BY ANOTHER—STRIKING OUT EVIDENCE.—A witness cannot testify to his understanding of the meaning of words used by another. But, if he does so, it is not error, if the court orders the answer stricken out, and instructs the jury not to consider it.

APPEAL from a judgment of the superior court of San Joaquin county, entered upon a verdict convicting the defendant of murder, and from an order denying him a new trial. The opinion states the facts.

Eagon & Armstrong, for the appellant.

E. C. Marshall, attorney general, for the respondent.

MCKEE, J. Appeal from a judgment of conviction of murder in the first degree and an order denying a motion for a new trial.

1. The material point upon which the defendant relies for a reversal of the judgment is, that the jury were misled, by the instructions of the court upon the question of punishment, to return a verdict of murder in the first degree, without a declaration of what the punishment should be.

The charge of the court as to the power and duty of the jurors upon that question was quite elaborate. Altogether six or seven instructions upon the subject were given, which might have been more forcibly expressed by reading to the jury section 190 of the penal code. But the thought expressed by the several instructions was this: If the jury should agree to find the defendant guilty of murder in the first degree, then they had the right, under the law, in the exercise of their duties, to go further and determine the punishment of the defendant, *i. e.*, whether he should suffer the highest penalty of the law—death—or the milder punishment of imprisonment for life. If they determined upon the former it would not be necessary for them to declare it in their verdict; but if upon the latter it would be.

It is true that in the elaboration of the instructions upon that question the court did not directly tell the jury that if they did not,

by their verdict, declare the punishment, the court, on a verdict, returned by them, of murder in the first degree, would have to pronounce judgment of death; but later on in the proceedings it did give them to understand that if they did not declare in their verdict that the punishment shall be imprisonment for life, the court would have to perform its duty by imposing the punishment of the law.

Upon receiving the original charge the jury retired for deliberation and, afterwards, being brought into court, announced they were agreed upon the question of guilt but not upon the question of punishment. Upon that announcement the following took place between the court and jurors:

"Court—Do I understand the jury to disagree simply upon the matter of punishment?

"Juror—Yes, sir; I am not willing to pass sentence * * * by which the man should be killed, because I think there were some mitigating circumstances. * * *

"Court—The jury have the right to fix the penalty at death or imprisonment for life. * * * If the jury bring in a verdict of guilty of murder in the first degree, without specifying the penalty, they may do so.

"Juror—Then we are not compelled to do it.

"Court—You are not compelled to do it, you simply have the discretion."

The jurors again retired and again returned into court for information upon the same subject:

The same juror, addressing the court, said: "I got the impression that if the verdict was returned of guilty of murder in the first degree, without anything further, it inflicted the death penalty. Some of my fellow jurors thought it did not. I want to be certain of that."

The court again read to the jury section 190 of the penal code, and, in connection therewith, said to the jurors: * * * "If there is nothing specified, in your verdict, as to the penalty, the court will have its duty to perform, but what the duty will be the court will not say."

Of the duty of the court upon receiving a verdict of guilty of murder of the first degree, there could have been no doubt in the mind of the judge. The law, as construed by this court, is clear. "If a jury shall agree that a defendant is guilty of murder in the first degree, but cannot agree that the punishment shall be imprisonment for life, or shall not declare that the punishment shall be such imprisonment, it will be the duty of the court to pronounce judgment of death. The jury need not declare that death shall be inflicted—in cases where they cannot agree on imprisonment—since, if the verdict is silent, in respect to the penalty, the court must sentence the defendant to death:" People v. Welch, 49 Cal., 185. We do not, therefore, understand why the court should have hesitated to directly say to the

jurors what his duty would be in case they returned a verdict of guilty of murder in the first degree.

But the question is, did that hesitancy in any way mislead the jurors as to their powers or duties? The jury *did* agree upon their verdict and, in the performance of that duty, it is not claimed that they were misled by any of the instructions of the court. They did not agree on imprisonment of the defendant for life, but they returned a verdict of murder in the first degree, which was silent in respect to the penalty. Were they prevented from agreeing on the penalty by any of the instructions of the court upon that subject? We think not. The only juror who doubted in the matter seems to have been at last satisfied with the information which he obtained from the court. For upon receiving that information he agreed to a verdict without a declaration as to the punishment, and returned the same to the court as his verdict. There is nothing in the record tending to show that he had any doubt as to the grade of the crime of which the defendant was guilty.

This result was reached after receiving the elaborate and reiterated instructions of the court as to their power and duty upon the question of punishment; and we cannot see how any of the jurors could have been misled into disagreement upon the question by anything contained in the instructions.

Besides, we think it evident that the jury were not misled, for there was no dissent to the verdict as rendered. At the request of counsel for defendant, the jury were polled, and each one answered that it was his verdict—the doubtful juror saying, when his name was called: "Yes, that is my verdict, and I will leave the responsibility to the court." After which the polling of the jurors proceeded further, and *all* the jurors answered: "Yes, that is my verdict."

2. The homicide, of which the defendant was convicted, was of a man named Peter Wells. It was committed in the town of Oleta, Amador county, on the fourteenth of March, 1884. On the trial of the case, Lee Marcellus, a man who had been in the employ of Wells, was examined as a witness for the defendant, and gave testimony tending to show that, on the morning of the day of the homicide, Wells, being armed, started to go to the town of Oleta, where he expected to meet with French, with whom he had had previous differences, and wanted the witness to arm himself and go with him; but the witness refused, and tried to dissuade Wells from going, saying to him that "he would meet French there and there would be shooting." To which Wells replied: "If there was to be trouble, there was no use in trying to stave it off."

In cross-examination the district attorney asked the witness questions to draw out a conversation between him and the wife of Wells, after the homicide, in which he told her that he had said to Wells, a few days before the homicide, "if he would let him (the witness) have a rifle he would put French in a prospect hole," and that Wells said to him "he didn't want anything of that kind." Objections to the questions, upon the grounds of irrelevancy, immateriality, and

want of preliminary proof, were overruled by the court against defendant's exceptions.

In answering the questions the witness testified, in substance, that a day or two before the homicide, the witness had said to Wells: "If I thought that man (French) was hunting us in the chapparal I would go down and get him;" to which Wells said: "No," and that he (the witness) did not remember whether he had told it to Mrs. Wells, but if he had he told it to her as it was.

Manifestly, the court admitted the evidence to affect the credibility of the witness. We cannot see any other ground upon which it was entitled to admission. If counsel for the defendant understood that it had been admitted on any other ground, or was apprehensive that it might have been used for any other purpose in the case, he could have asked the court by a proper instruction to have limited it to the question of the credibility of the witness; but having failed to do that, we cannot see that there was any prejudicial error in the ruling or action of the court in the matter.

3. After the defendant had rested his case, the district attorney called a witness of whom he asked the following question: "During your association with the deceased, Wells, and the actions on his part, from words of his and combination of all the circumstances that would tend at all to throw light on the subject, what was the feeling and the expressed feeling between Wells and French?"

The court should have sustained the objections made to the question.

A witness cannot testify to his understanding of the meaning of words used by another; or to his inferences drawn by him from a "combination of circumstances tending to throw light" on the question of feeling between two persons. That is a matter for the jury upon proof of the words or circumstances themselves. The question was, therefore, objectionable. But the question itself was not answered, for the record shows that the answer of the witness to the question was, by consent of the district attorney, stricken out; and the court also instructed the jury to disregard it because it was stricken out.

There being no prejudicial errors in the record, the judgment and order must be affirmed.

It is so ordered.

MYRICK, J., MORRISON, C. J., and THORNTON, J., concurred.

No. 9,094.

HULSEY v. BRYAN.

No. 9,095.

FITZPATRICK v. BRYAN.

No. 9,096.

WILSON v. BRYAN.

In Bank. Filed August 29, 1885.

JUDGMENT REVERSED WITH INSTRUCTIONS to insert in the findings all documents showing title in the respective parties.

APPEALS from judgments of the superior court of Shasta county, entered in favor of the plaintiffs.

Chipman & Garter, for the appellants.

C. W. Taylor and *A. R. Andrews*, for the respondents.

THE COURT. These cases are not so presented in the record that the court can satisfactorily pass on the titles of the parties so as to determine which has the preferred right to purchase from the state.

The cases will go back that all the facts as to the titles of the parties may be found. In finding these facts, the court will insert in the finding all documents showing title in the respective parties. For the purpose above indicated, the judgment and orders are reversed and causes remanded that on the testimony already taken, and on such other evidence as either of the parties may address, the court may find the facts, adduce its conclusions of law, and render judgments accordingly.

So ordered.

No. 9,152.

SHARP v. BLANKENSHIP.

In Bank. Filed August 29, 1885.

BOUNDARIES—ACQUIESCENCE IN DIVISION LINE—PAROL AGREEMENT TO CHANGE—STATUTE OF FRAUDS.—Where two adjoining owners of land agree upon their boundary line, and a division fence is erected upon the same, and acquiesced in, and possession held in accordance therewith, for a sufficient length of time to create a title by adverse possession, a subsequent parol agreement between the owners, by which a surveyor was employed to run the division line between them, which line was, thereafter, to constitute the boundary, is within the statute of frauds, and not binding.

APPEAL from a judgment of the superior court of San Joaquin county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

J. B. Hall and *W. L. Dudley*, for the appellant.

F. T. Baldwin and *J. C. Campbell*, for the respondent.

THORNTON, J. Action of rejectment to recover a tract of land situate in San Joaquin county. Both parties claim under Charles M. Weber. The land in controversy was parcel of a rancho known as the Campo de los Franceses of which Weber was the owner. The litigation is in regard to a boundary line between the plaintiff and defendant. The boundary line in controversy is the western line of plaintiff and the eastern of defendant.

There was evidence tending to show that Weber had caused the rancho above named to be surveyed and subdivided into sections, the sections being sixty-nine (69) chains and seventy-two (72) links square—the side lines of the section being a little less than ten chains short of a mile and that these sections were subdivided into four quarters, constituting four squares of equal area. There was also evidence tending to show that this boundary line in dispute was marked by stakes set in the ground when the survey of the rancho was made by Weber, that the boundary line in dispute was marked by corner-posts or stakes that were pointed out to Balch, the grantor of defendant, in 1858 by Weber. This appears to have been done in 1858 when Balch was negotiating with Weber for the land which was afterwards purchased by Balch of Weber, and this Weber conveyed to him. The evidence further tended to show that the western boundary line of plaintiff was marked by corner posts or stakes. There was no controversy that plaintiff owned the southeast quarter of section 26, and that defendant owned the portion of the southwest quarter of same section, adjoining in its whole length on the west the southeast quarter.

The testimony also tended to show that soon after Balch went into possession in 1857, he built a fence from corner section post to corner section post on the west line of southeast quarter of section 26, that it remained there until some time in 1877 or 1878, when a controversy arose between plaintiff and defendant as to the boundary line between them—defendant claiming that plaintiff had in his possession within the fence above mentioned some of his (defend-

ant's) land. This plaintiff denied, but averred that he did not wish to deprive defendant of any land owned by him. Under this state of things, an arrangement was entered into between them by which a surveyor was employed to run the disputed line between them, at their mutual expense. This appears to have been done, and the line as surveyed and run did show that plaintiff's inclosure did contain land that was a part of southwest quarter of section 26, belonging to defendant. Plaintiff insisted that the line was not correctly run, was not on the true line, and there was evidence to show that he never agreed to accept or adopt the line thus run as the true line.

The plaintiff requested the court to charge the jury as follows:

"Although the jury shall find from the evidence that the plaintiff agreed with the defendant in 1877, or thereafter, that the county surveyor should run the line between their respective lands, and such line should become the line on which the division fence should be built, yet, if the jury shall further find that said plaintiff, at any time before the entry of said defendant on the land in suit, refused to accept or adopt the said surveyed line as the true and correct line, the jury must consider the case in the same light as if plaintiff had not agreed to have the line surveyed, and as if no survey had, in fact, been made." This request was refused, and plaintiff excepted.

It is apparent, from what has been above stated, that the evidence tended to show that the plaintiff derived title to the part of land known as southeast quarter of section 26, the western boundary of which was marked by stakes or posts put in the corners by Weber for that purpose, and that plaintiff took possession and built the fence on this line according to the line so marked.

Now, if plaintiff obtained title to and became the owner of the quarter section above mentioned, bounded on the west by a fence between the posts above mentioned, it would be difficult to perceive, under the statute of frauds of this state in force at the time the transactions referred to took place, why he lost it by a line surveyed in the manner above pointed out, to which he never agreed. If the line thus surveyed had been adopted by both parties, and possession taken accordingly and held for a period of time sufficient to build up a title by adverse possession, it might be held that the title would have vested in them according to the line so adopted and acted on; but there is no such evidence here. See Adams v. Rockwell, 16 Wend., 285, and cases there cited and commented on. Indeed, there is evidence which, if true, proves that the plaintiff never agreed to or adopted the line.

The court erred in refusing this instruction. Nor was the error cured by giving it with the words appended by the court. The words appended are, "except so far as the evidence in regard to the agreement of survey may tend to show that there was no acquiescence on the part of Blankenship in the old line."

We cannot perceive that the words appended are at all pertinent to or had any connection with the matter of the request. The latter relates only to a new line, and the former to the old line, which appeared to be and was entirely different from the new. The question whether Blankenship, the defendant, acquiesced in the old line or not, had no connection with the proposition stated in the request in regard to the new line. The request did not tend in any way to take from the consideration of the jury any thing in the case bearing on the issue of the acquiescence of defendant in the old line. The words added to the request by the court certainly had a tendency to lead the minds of the jury away from the question which should have been submitted to them as embodied in the request.

For this error the judgment and order are reversed and the cause remanded for a new trial.

MORRISON, C. J., MCKINSTRY, J., ROSS, J. and MYRICK, J., concurred.

WEST COAST REPORTER.

WHOLE No. 90. SEPTEMBER 17, 1885. VOL. VII. No. 10.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

No. 3,614.

UNITED STATES *v.* KATE MCLAUGHLIN ET AL.

August 18, 1885.

EXCEPTIONS TO ANSWER IN EQUITY FOR INSUFFICIENCY.—Exceptions for insufficiency to answer to particular allegations in bills in equity, only, lie, where a discovery is sought,—where the complainant seeks evidence to sustain his bill.

SAME—CORPORATIONS—INFANTS, ETC.—Such exceptions do not lie to answers of corporations; to answers wherein the defendant's oath is waived; to answers of the attorney general, or to answers of infants; because such answers are not evidence.

THE FOUNDATION FOR AN EXCEPTION FOR INSUFFICIENCY consists of a sufficient allegation in the bill, and a sufficient interrogatory based upon it.

SAME.—Under the old equity practice, the general interrogatory, at the end of the bill, requiring defendant to answer every allegation as fully and particularly, as if specifically interrogated thereto, was held to afford a foundation for an exception for insufficiency. But it was necessary, that there should be either a special interrogatory, or this general requirement.

UNDER EQUITY RULES 41–43, it is, at least, doubtful, whether an exception for insufficiency, would now lie in the national courts without a special interrogatory.

PRACTICE OF EXCEPTING FOR INSUFFICIENCY OBSOLETE, AND DANGEROUS TO COMPLAINANT.—Where the parties are competent witnesses, the practice of calling for a discovery, and, excepting to answers for insufficiency, is useless, and becoming obsolete. The great inconvenience, and danger, to complainant, of pressing the defendant to positive denials by exceptions, pointed out.

BILLS OF DISCOVERY OBSOLETE.—Whether a pure bill of discovery will lie, where the parties are competent witnesses, *quære*?

EXCEPTIONS FOR IMPERTINENCE.—The court will not order matter excepted to as impertinent, to be stricken out, unless its impertinence is very fully, and, clearly, made to appear. Nor will the court strike out matter as impertinent, because there are here, and there, a few unnecessary words.

FINAL LOCATION OF RAILROAD LAND GRANT.—Suggestion as to when location becomes definitely fixed, under the Union Pacific Railroad grant, so as to perfect the right of the grantee to the land.

S. G. Hilborn, United States attorney, and *Mich. Mullany* for the complainant.

A. L. Rhodes, for the defendants.

SAWYER, CIRCUIT JUDGE, delivering an oral decision:

In the numerous exceptions filed by complainant to the answer in this case, two grounds are specified, insufficiency, and impertinence.

Two classes of insufficiency are recognized in equity practice. The first, is, where the whole answer is alleged to be insufficient, to constitute a defense. In such a case, the complainant, usually, has the case set down for argument upon the bill and answer, and the question is disposed of in that method. In other cases, exceptions for insufficiency, are taken, as to some particular portion or portions

of the answer, upon the ground that certain allegations of the bill have not been admitted, or, fully, and, specifically, denied, or, that the denial is evasive. In such cases, the object of the party excepting, is, to get in the answer a full, specific and clear admission, or denial of the allegations. Exceptions for insufficiency, in respect to such matters, are, only, applicable to matters of discovery, where the complainant is compelled to rely on the defendant for evidence to prove his case. Such an exception, will not lie to the answer of a corporation, because the answer of a corporation is not evidence; it is not put in under oath, but under the seal of the corporation. And, for similar reasons, an exception for insufficiency as to the answer to any particular allegation of the bill, does not lie, where the oath to the answer is waived. The same rule applies to the answer of the attorney general, and answers of infants: 2 Dan. Ch. Pr., ed. 1841, 879, and note.

Exceptions for insufficiency, of the class last referred to, can relate, only, to the subject matter of a bill of discovery, where a party seeks to obtain, in the answer, evidence from his opponent; and they are, specially, adapted to a system of practice, where parties are incompetent witnesses in their own cases.

With relation to such exceptions, Hoffman, in his Master in Chancery, says: "The foundation for an exception for insufficiency consists of a sufficient allegation in the bill, and a *sufficient interrogatory based upon it.*"

And it has been held, under the old practice, that the general interrogatory at the end of the bill, requiring the defendant to answer, as to all matters alleged in the bill, as, fully, and, particularly, as though specifically interrogated thereupon, is a sufficient interrogatory upon which to base an exception. But there must always have been, as a foundation for such an exception, either that general demand in the answer, or a specific interrogatory directed to the particular allegation of the bill, specified in the exception.

In the case of Methodist Episcopal Church v. Jacques, 1 John. Ch., 75, it was held that the general interrogatory in the bill is sufficient to base an exception of this kind upon.

"The mere objection to a further discovery, is, that the bill contains no special interrogatories. The bill contains the *general* interrogatory 'that the defendants may full answer make to all and singular the premises, fully and particularly, as though the same were repeated, and they specially interrogated, paragraph by paragraph, with sums, dates and all attending circumstances, and incidental transactions.' The question, then, is, whether this be not sufficient to call for a full and frank disclaimer of the whole subject matter of the bill; and I apprehend the rule on this subject to be, that it is sufficient to make this general requisition on the defendant to answer the contents of the bill, and that the interrogating part of the bill, by a repetition of the several matters, is not necessary."

It has, also, been held, that no exception would lie, except where an interrogatory, either special, or general, like that just quoted, called for an answer to the allegations of the bill. The decision cited was rendered before the adoption of the equity rules of the supreme court. In our present practice, under the provisions of equity rules 41–43, which permit a complainant, if he desires, to file interrogatories, and prescribe the form to be followed, I apprehend, that a general interrogatory would be insufficient. But, however, that may be, the bill in this case, is in no sense a bill of discovery, excepting so far as all bills, in which an answer under oath has not been waived, may, in a certain sense, be regarded as bills of discovery. It contains no general interrogatory, and no specific interrogatory pointing to the matter set forth in the exception, and, manifestly, was not intended as a bill of discovery, but as, purely, a bill for relief. Though an answer upon oath is not waived, yet no demand in the nature of those which distinguish a bill of discovery is made anywhere in the bill. It is manifestly intended, simply, as a bill for relief, the complainants not seeking evidence, but intending to rely upon the testimony of witnesses to prove their case.

It is very doubtful, whether a pure bill of discovery in an equity suit, would lie at the present day. It may be, that a discovery might be asked for in a bill for relief; but it is probable, that no prudent counsel, understanding what must be the effect, would at this day file a pure bill of discovery, or call for a discovery in a bill for relief, and thus, unnecessarily, give the defendant an advantage, which he would not otherwise have, under our present practice, which enables a complainant to place the defendant upon the stand and examine him as a witness, and, thereby, obtain his testmony much more judiciously—testimony of a character less prejudicial to his client's interests, than it would be, were the testimony to come in the form of a sworn answer, strained through the legal cullender of his counsel, and by him shaped, and shaded, in his office at his leisure. Very wisely, I think, the bill, in the present case, has been made a bill for relief, not a bill of discovery. See Slessinger v. Buckingham, 8 Saw., 469.

In *Ex parte* Boyd, 105 U. S., 657, the supreme court intimates, that, at this day, bills of discovery are not only, useless, but, obsolete; and very, strongly, intimates a confirmation of the idea which this court has endeavored to impress upon the bar here; that is to say, that the spending of time upon exceptions to answers is useless, and such exceptions are, usually, very much to the disadvantage of the party resorting to them. A defendant is often pressed to a direct denial, which constitutes proof of his case, in his own favor, which must be overthrown by the testimony of two witnesses, or equivalent proof on the part of the complainant. As I have intimated, this bill contains no allegation looking to a discovery. It merely undertakes to allege the grounds of suit, and to develop the issues, and, manifestly, was not intended to obtain evidence to prove the issues.

The first exception is, in general language, that an allegation of complainant's bill of complaint, indicated, "is not sufficiently, or at all, answered, denied, or admitted in or by said answer."

There is in the bill no demand for an answer, general or specific, upon which that exception can rest. The bill is not framed for the purpose of procuring evidence, but is, evidently, for relief merely. I shall therefore overrule that exception, and leave the complainant to make his proof in relation to the facts referred to, by calling the parties as witnesses, if he so desires, or by other documentary evidence, and to obtain evidence by proceeding in the ordinary course. One of the defendants is a corporation, to an answer of which, exceptions for insufficiency, as we have seen, do not lie.

The other exceptions, although some of them refer to matters in the answer, which are alleged to be impertinent, or refer to particulars in which the answer is alleged to be ambiguous, or insufficient, are all, really, exceptions for insufficiency. There is no such term as "ambiguous" known in equity practice, with relation to a pleading, except in so far as it may be embraced in the term "insufficient." An answer may be insufficient because it is ambiguous.

Another averment contained in these exceptions, is, that the answer is, with reference to certain portions of the bill, impertinent. In the fourth exception a certain portion of the answer is alleged to be impertinent, indefinite and ambiguous. The only point to that exception, must be, that the allegations referred to are impertinent. The rule as to impertinence is well stated by Justice Story, in Story's Equity Pleadings, section 267, as follows:

"However, in cases of mere inpertinence, the court will not, because there are here and there a few unnecessary words, treat them as impertinent; for the rule is designed to prevent oppression, and is not to be so construed, as to become itself oppressive. Nor will the court, in cases of alleged impertinence, order the matter alleged to be impertinent, to be struck out, unless in cases where the impertinence is very fully and clearly made out; for if it is, erroneously, struck out, the error is irremediable; but if it is not struck out the court may set the matter right in point of costs."

In a note, attention is called to the language of Mr. Vice Chancellor Bruce, in the case of Davis v. Cripps, 2 Younge & Coll., New Reports, 443:

"The court, in cases of impertinence, ought, before expunging the matter alleged to be impertinent, to be especially clear, that it is such as ought to be struck out of the record, for this reason, that the error on one side is irremediable, on the other not. If the court strikes it out of the record, it is gone, and the party may then have no opportunity of placing it there again; whereas, if it is left on the record, and is prolix or oppressive, the court, at the hearing of the cause, has power to set the matter right in point of costs. That consideration has been alluded to by Lord Eldon, in Parker v. Fairlie, and other cases. It ought to be *clear to demonstration that the matter complained of is impertinent before that which, if wrong, is*

irremediable, is done." See, also, Attorney General v. Rickards, 6 Bev., 444; and Tucker v. Cheshire R. Co., 1 Foster, 38.

In my judgment, none of the matter pointed out by the exceptions, filed in this case, is so, clearly, impertinent, as to justify the court in striking it out. To go into the question of striking it out, might require me to pass upon the merits of the case; whereas, unless those portions of the answer referred to in the exceptions, are clearly, impertinent, they ought not to be stricken out until the final hearing, when the whole case is before the court, and they can be dealt with as justice, and the rights of the parties may demand. Whatever may be the decision in this suit, the case will, undoubtedly, go to the supreme court of the United States on appeal; and if I should be of opinion, that these portions of the answer are impertinent, and strike them out, the supreme court might be of a different opinion, and yet, if stricken out, the supreme court would have no basis upon which to finally determine the question, and render a proper decree; and it might be necessary to affirm an erroneous decision, because a part of the defendant's case is not in the record.

The portions of the answer which it is most, earnestly, insisted, are impertinent, relate to the different steps taken in, definitely, fixing the line of location of the railroad. I think the setting out of those steps in the answer is, eminently, proper. It is assumed, that the supreme court, by its decision in the Dunnemeyer case, has established the law in this regard. Undoubtedly, it has settled the law, so far as this court is concerned. But counsel have a right to ask the supreme court to modify or amend its decision in that case, or to consider its application to a new state of facts. They have a right to submit the question again to that tribunal; and if these portions of the answer be stricken out, there will be no basis upon which to bring these questions, again, before the court. Besides, in the case referred to, only the case there presented was decided, and the decision is authoritative, only, to the extent called for in that case. In that decision, it is held, that the line of the road becomes fixed when it is, definitely, fixed by the company; and a map of the location filed in the office of the secretary of the interior. The time of the filing of such map was sufficient for the purposes of that case. There might be found to be a difference in this case. That is to say, the filing of the map, might be the evidence, and the only evidence, that the secretary of the interior would act upon in issuing a patent. He would require evidence as to the time when the line of the road was definitely fixed, in order to justify him in exercising his functions of issuing a patent. That was the question before the court in the Dunnemeyer case, and it is a very different question from the question, whether, or not, some other person has the prior right. The statute, in no provision, requires that a map of a definite location shall be filed. It is, only, a map of the general location, that the statute requires to be filed in the office of the secretary of the interior; and upon the filing of that map, all lands lying within fifteen miles on each side of the road, are reserved from

sale, which is a distance of ten miles wider than the extent of the lands granted, giving an opportunity for the line of the road to swing, at least, five miles from the line, as shown in the map of general location, and still have ten miles within which to fix the limits of the grant.

On filing the map of *general* location, under the statute, the lands are withdrawn from pre-emption, or from opportunities on the part of any one else, to acquire rights in them, and that condition of things remains until the road is, definitely, located and built. When it becomes definitely located, in fact—and it is, certainly, really, definitely, located, when the road is constructed and finished—the railroad company has performed all its duties, and its right to the land has become perfected, I should suppose—at least, counsel may well so argue—and they are entitled to have the question determined by the supreme court, as well as by this court. Even if the secretary of the interior can, properly, refuse to act upon any other evidence than the filing of the map, *definitely* fixing the location, yet, this is but a rule adopted for *administering the affairs of his office*, and the railroad company's title might still well be fixed and indefeasible before the filing of a map of the definite location; and that map might, only, furnish, final and conclusive evidence, upon which the patent should be issued. The right to the land may be perfect, before the patent issues, or would be issued, the patent being but the final record, and indisputable evidence of the title. The allegations of the answer, then, as to the time when the location was made, as well as, when the plats of the different portions of the location were filed, can, by no means, in my judgment, be stricken out, as impertinent. I think those are matters, which should be left in the answer, and open to proof, for consideration by this court, and by the supreme court, on appeal. Even if I should deem such matter impertinent, the supreme court might take a different view, and the parties here have the right to have that question passed upon, on appeal.

These observations especially refer to the exception which was most elaborately argued and most strongly insisted upon; and the other exceptions are of similar character. It may be that some few words, which are excepted to, are impertinent, but they are not so, clearly, so, or of such importance, as to justify me in sustaining the exceptions.

The exceptions are, therefore, overruled, with leave granted to complainant to file a replication within five days.

No. 3,330.

DORA A. BUNT ET AL. v. SIERRA BUTTES GOLD MINING COMPANY.

September 2, 1885.

NONSUIT IN NATIONAL COURTS.—A nonsuit at the close of plaintiff's case, is never granted in the national courts. The proper practice in such courts, where the evidence for plaintiff fails to make a *prima facie* case, is, to instruct the jury to find a verdict for the defendant.

PARTY ASSUMING RISK OF KNOWN DANGER.—Where an employee in a mining tunnel knows that the roof of the tunnel at a given point is in an unsafe condition, and with such knowledge engages in the work of making it safe, voluntarily, sits down to rest himself under the dangerous point during a suspension of his work, and, while so seated, is killed by the falling of the roof upon him, the owners of the tunnel are not liable to an action for his death in favor of the surviving wife and children.

INSUFFICIENT EVIDENCE.—Where the evidence is such that the court would feel bound to set aside any verdict in favor of plaintiff, it is the duty of the court to direct a verdict for defendant.

J. C. Black, for the plaintiffs.

Harry I. Thornton and *Eugene R. Garber*, for the defendant.

SAWYER, CIRCUIT JUDGE. At the conclusion of plaintiff's testimony, in this case, on yesterday, the counsel for the defendant moved the court to instruct the jury to find a verdict for the defendant, on the testimony introduced by the plaintiff, on the ground, that, upon the case made by the plaintiff's evidence, all taken as true, the defendant is not liable; that, taking the evidence in its strongest light, against the defendant, the plaintiff presented no case upon which she is entitled to recover. In such cases, a motion of this kind is the proper practice in this court. The application is a substitute for a motion for nonsuit in the state courts. This court never grants a nonsuit—the proper motion being, to instruct the jury to find a verdict for the defendant. This case, like many others, of a somewhat similar character, that I have had occasion to try, is one, that, necessarily, excites sympathy in favor of the plaintiff. We are bound, however, to be governed by the rules of law, and the legal rights of the parties. On an examination of the authorities presented by the counsel last night, and in view of numerous others, that I have before had occasion to examine, I am satisfied that this is not a case in which the plaintiff is entitled to recover. All of the numerous cases cited by plaintiff's counsel, have other features, that distinguish them from this case, and cases like it. Taking the evidence presented by plaintiff, as all true, and viewing it in the light most favorable to her, it does not present a case, in which, under the law, she is entitled to recover.

In excavating the tunnel, the roof, according to all the testimony, was left solid, at first. It was, originally, a roof of solid rock, but subsequent blasts beyond, had somewhat shattered it. In October, and just before the accident, which caused the death of the plaintiff's husband, the superintendent of the mine was in the tunnel, and he saw that the roof looked somewhat shattered. He examined it, striking the roof at various points with a pick, and found that it might be dangerous. He, thereupon, directed those working in the

tunnel, of whom the deceased was one, to put in a set of timbers to support the roof. There was one post only, there, but, according to the testimony, which was not contradicted, it was not put there to support the roof; but placed in a narrow seam in the side of the tunnel, to prevent the light, soft vein matter from running into the tunnel from the side; and not for the purpose of supporting the roof. One of the two men in charge,—there being two in equal authority, of whom the deceased was one—George Dubourdieu, asked the question, if it would not be better to remove that post, and put in the set, so that one of the posts of the set, should stand in the same cut occupied by the post already there. The superintendent told him, that, if they thought they could do it with safety, they might do it in that way; but to satisfy themselves, that it would be safe, before moving the post; and if it would not be safe, to set one of the posts of the new set by the side of that post, a little beyond it. The deceased, with George Dubourdieu, and the others, had a conference on the subject, and considered the question whether they could remove the post, there standing, with safety, and they came to the conclusion, that they could. They acted on their own judgment. Both deceased, and George Dubourdieu, were experienced miners, who had been a long time, at work in this tunnel, and, were, doubtless, as well informed on the question, and as well qualified to judge of the safety of the act, as the superintendent himself. On examination, deceased assented to the conclusion with the others. They discussed the question, and concluded, that they could remove the post without danger; and put one of the set in its place. They proceeded to do that. The post was knocked out. The deceased assisted in moving it out of the way. He was just as well informed of the condition of that roof, and the dangers attending the work, as was the superintendent himself. He was consulted in regard to it,—formed his own opinion as to the danger involved, and concluded that the removal could be made with safety. The men—and he was one of the shift bosses—acted, on their own judgment in the matter. It is manifest, that, they were parties, who were capable of judging of those matters. In proceeding to do that work, and knowing the danger, they, voluntarily, took the risk. I think this is a much stronger case for the ruling I make, than McGlynn v. Brodie, 31 California, 376, in which the question arose on a motion for nonsuit, and, where all the authorities on the subject are fully discussed. That was a case in the state court, and the nonsuit was sustained by the supreme court of the state. This is a much stronger case for the ruling I make than that case. So in Kielley v. The Belcher S. Mining Company, 3 Sawyer, 502, which was a case in Nevada, not clearer than this, I was compelled to rule in favor of the defendant. The deceased, in this case, was just as well informed as the defendant, or the superintendent, himself, was, and, voluntarily, with knowledge of the danger, assumed the risk of the work. It was not, therefore, the fault of the defendant. In this case, there was no defective machinery at all. It was the condition of the roof in the tun-

nel, produced, in part, by the act of the deceased, in blasting. If the accident could be regarded as the result of the carelessness of George Dubourdieu, the latter was a fellow servant, and there is no liability on that ground: Buckley v. G. & C. S. M. Co., 8 Sawyer, 395. But deceased had equal authority with George Dubourdieu, and, he himself, was consulted, and the negligence was as much his own, as of George Dubourdieu.

More than that, at the moment when the accident happened, the deceased was not, actually, engaged in doing anything relating to that matter. His duty at the time of the accident, did not require him to be in the position of danger at all. He had performed the duty of removing the post from the place, and put it out of the way, and he was at the time, not engaged in the performance of any duty connected with the work. Having a little leisure, while the other workmen were clearing out the place to put in the other timbers, he sat down to rest himself, and, deliberately, sat directly under the shattered roof. Knowing its condition, he, voluntarily, selected that place for a seat upon which to rest himself. He was doing nothing at the time. There was, at that time, no occasion at all for him to sit, or be, at the point where the accident occurred. He assumed, voluntarily, for his own convenience and comfort, the responsibility of selecting that particular place in which to sit, and he sat, immediately, under the shattered rock. The space shattered was only four or five feet wide. If he had selected a place in which to sit two feet further out, he would have been clear of danger, and would have escaped. After his attention had been called to the condition of the roof, and having discussed the question, as to whether it was safe to take this post out, and at a point of time when he had nothing at all to do with the work—no duty to perform in connection with it—he, deliberately, of his own accord, sat down directly under the dangerous place, whereas, if he had selected a place two feet or more further out, he would have been out of danger. That is an act of his own, and the company cannot be held responsible for the consequences resulting from it. Knowing all the circumstances of the case, he performed that act, for his own comfort, and while sitting at the point, so selected by himself, under the circumstances indicated, the rock fell. He was, evidently, on the lookout, for he was the first to discover the giving away of the rock, and he called out to the others, "Boys, it is coming," or something to that effect, and sprang out. Under the state of facts indicated, which is shown by the uncontradicted testimony, but one conclusion can be reached, on the law applicable to the case, which, is, that the plaintiff is not entitled to recover. In my judgment, the deceased lost his life in consequence of his own fault, rather than from the fault of the defendant. If the defendant was at fault, at all, deceased contributed to the result in such manner, and to such extent, as to exonerate the defendant from liability. Without his reckless concurring act, this accident would not have happened. I think, therefore, that the defendant is entitled to the instruction asked.

I will say in conclusion, that I find, that the case was tried once before Mr. District Judge Sabin. At the close of the plaintiff's testimony, on that trial, there was no such motion, as is now made. The case went to the jury on the testimony, and the jury found for the plaintiff. For the same reasons which I have now given, and I suppose upon similar testimony, Judge Sabin held, that the verdict was not justified by the evidence, and granted a new trial on that ground. Where the evidence is such, that the court would feel bound to grant a new trial, in case the jury should find a verdict for the plaintiff, it is the settled doctrine of the supreme court of the United States, that it is the duty of the circuit court, to direct the jury, at the close of the plaintiff's testimony, to find a verdict for defendant. Being satisfied, that there is no case for liability against the defendant, and that I should be compelled to set aside any verdict that the jury might find for the plaintiff, in this case, I am in duty bound to follow that direction of the supreme court, and give the instruction required.

The circuit judge then directed the jury to find a verdict for defendant, which was done.

No. 3,009.

SILSBY MANUFACTURING CO. *v.* TOWN OF CHICO.

September 7, 1885,

ARTICLE TO BE SATISFACTORY TO PURCHASER.—Where a contract is made, to make and deliver an article which shall be satisfactory to the purchaser, the article must be satisfactory to him, or he is not bound to take it.

IT IS NOT SUFFICIENT THAT IT OUGHT TO BE SATISFACTORY.—It must, in fact, be satisfactory.

BAD FAITH IN PARTY TO BE SATISFIED.—Where the party to be satisfied, is in fact satisfied, but in bad faith, and in fraud of the rights of the other contracting party, declares, that he is not satisfied, the contract has been fully performed and the purchaser is bound to accept the article contracted for.

COMMITTEE TO BE SATISFIED.—Where a steam fire engine was contracted for, to be satisfactory to the fire committee of the town, and there was a change in the members of the committee after the contract was made, and before the tender of the engine, under it; *Held*, that the committee to be satisfied, is the committee existing at the time of the performance of the contract, and tender of the engine.

Wm. H. H. Hart, Park Henshaw and *A. B. Colton*, for the plaintiff.

W. C. Belcher, J. D. Sproul and *F. C. Lusk*, for the defendant.

SAWYER, CIRCUIT JUDGE. The only question in this case, upon which I have any difficulty, arises out of the following provision of the contract: "The Silsby Manufacturing Co., will send the above described steam fire engine to Chico, *subject to the approval of the fire committee, and will warrant the workmanship, finish, and performance* of the machine *satisfactory to them*, or, *remove the same without expense*," etc.

The authorities are abundant, to the effect, that, upon a contract containing a provision, that an article to be made and delivered, shall be satisfactory to the purchaser, *it must be satisfactory to him*,

or he is not required to take it. It is not enough, that he ought to be satisfied with the article; he *must* be satisfied, or he is not bound to accept it. Such a contract may be unwise, but of its wisdom, the party so contracting is to be his own judge, and, if he, deliberately, enters into such an agreement, he must abide by it. To this effect are McCarren v. McNulty, 7 Gray, 139; Brown v. Foster, 113 Mass., 136; Zaliski v. Clark, 44 Conn., 218; Gibson v. Cranage, 39 Mich., 49; Gray v. Cent. R. R. Co., N. Y., 11 Hun., 70; Hallidie v. Sutter St. R. Co., 63 Cal., 575; Heron v. Davis, 3 Bos., 336; Machine Co. v. Smith, 50 Mich., 570; Hoffman v. Gallagher, 6 Daley, 42.

At the time the contract in question was made, Messrs. Burke, Snook, and Hendricks, constituted the fire committee. At the date of the required performance, and of the tender of the engine, there had been a change of two members, and the committee was composed of Messrs. Burke, Noonan, and Croissant. I think the committee to be satisfied, is the one in existence, at the time of the performance, and tender. The old committee had ceased to exist, and had no longer any authority to act in the capacity of a committee.

It is admitted by both parties, that the engine failed on the first trial, and some of the witnesses testified that the failure was a complete and signal one; but the vendor claimed the failure to be in consequence of poor coal.

A second, and more thorough trial was had, with better coal—cannel coal—and it is claimed, by plaintiff, that the engine, in fact, performed all its functions strictly in accordance with the specifications, and requirements of the contract; and that the committee ought to have been satisfied, if they were not. The testimony was very full on this point, though to a considerable extent in conflict. Although there seems to be some ground for a difference of opinion on this point, upon the whole, I am constrained to think, though not with entire confidence, that it did come up to the specifications, and that the committee might well have been satisfied.

All the three parties, who composed the committee, at the time the contract was made, and who signed the contract, were satisfied with its performance, and considered, that the engine, in all particulars, came fully up to the requirements of the contract; and they so reported to the board of trustees.

But a majority of the committee, as then constituted, Messrs. Noonan, and Croissant, officially reported, that the performance was not satisfactory to them; that the engine failed to get up steam in the time required, and to keep up steam to a sufficiently high point to work, continuously, and effectively; and that they were not satisfied with its performance in these particulars. Burke, constituting a minority of the committee of three, made a contrary report. The town trustees, acting on the report of the majority, rejected the engine. If this were all, there can be no doubt upon the authorities, I think, that the engine was properly and lawfully rejected.

But it is insisted, and there is some grounds for suspicion on this point, that notwithstanding the report of Mr. Noonan, that he was not satisfied with the engine in the particulars indicated, yet, he was, in fact, satisfied, in his own mind, and so expressed himself in private conversations with Mr. Silsby, and other private parties, but, that in consequence of popular feeling, and an opposition to the contract, and to the purchase of any engine of that make and character, at all, developed in the town of Chico, after the making of the contract, he had ignored his own convictions, in regard to the performance of the engine, and, falsely, and, in bad faith, reported against it, in obedience to general popular clamor, in order not to injure his business, or his own popularity among his neighbors.

I am disposed to think, that, if such were clearly shown to be the state of facts, the court would be justified in disregarding the official report, as having been made, in bad faith, and in fraud of the rights of the other contracting party; and in adopting Noonan's own real conviction upon the subject. But, I cannot say, that the state of facts claimed is so satisfactorily shown as to justify me in holding the performance of the engine to be, in fact, satisfactory to Mr. Noonan, in the face of his official report, and his positive testimony to the contrary. There is, undoubtedly, testimony tending strongly to support the hypothesis insisted on by plaintiff; and circumstances tending to throw strong suspicion upon the acts in question. Mr. Silsby testifies, that on the evening of the test, Mr. Noonan "expressed himself as being perfectly satisfied with the engine." He says: "'The next day after the trial, at his store, in Chico, Alderman J. C. Noonan, said to me, 'Mr. Silsby, I am perfectly satisfied with the engine. There is a great deal of feeling here over the matter, and I am afraid it will injure me in my business. They are bringing strong pressure on me to vote against the acceptance of the engine, and, if I do so, I shall brand myself a coward, because the engine is all you claim for it.'"

Mr. Burke testifies that Noonan told him, in answer to a question, as to how he liked the engine, "that it did all, and more than was required of it,—that is my recollection," but that he could "not purchase the steamer," because "public opinion was so great;" that "public opinion was too strong against it," and "I will vote against it and I will vote myself a coward in doing so." Mr. Sproul testified, that in a conversation with Noonan, in regard to the merits, and demerits, of the machine, in the month of April, after the arrival of the engine, but he could not tell, "whether it was after this test or not," in which he referred to public opinion against the engine, and in that connection said, "so far as I can see, the engine fulfills all the qualifications."

Mr. Noonan, positively, denies having any conversations of such character, as stated by the witnesses; denies that he ever stated to either of them, that he was satisfied with the engine or that he should vote to reject it in consequence of public opinion. He admits having a conversation with Mr. Silsby upon the subject, but

not of the purport stated by Mr. Silsby. The following, said he, is "just exactly the shape I put that in; I said, that I did not care to prejudice myself as against public opinion; that it would not be fair for me to condemn his engine, because of public opinion; *that it would be condemned for other causes; that I did not think the engine came up to the requirements of the contract.*"

He states, that he expressed his dissatisfaction to Silsby, and the particular points, among them, were, "as I understood the contract, and was disposed to interpret it, we were to have a body of water on the house on fire, in four to six minutes. That this was needed in a town built of wood like Chico, where there are very dry summers. Inasmuch as she did not produce such a stream, I thought it was wrong; I thought she should do that." And there was testimony that there were other engines that would do that. In another place, he says, a stream of water could not be got on a house in less than thirteen minutes. He said Silsby appealed to his sympathy, and said he would rather give a thousand dollars, than to have the engine rejected, it would do him so much injury. He says, that he did sympathize with Silsby, and was desirous, that the engine should stand the trial.

Under the contract, the engine was "warranted to raise steam from cold water in *from four to six minutes*, and to generate and maintain an ample working pressure of steam for effective fire purposes." Noonan claims to have been dissatisfied on both these points. There is room for discussion as to what is meant by the phrase, "raise steam from cold water in from four to six minutes." Testimony of witnesses was taken upon the point, and different witnesses understood the phrase differently. Mr. Noonan appeared to be a candid and intelligent witness, and there is nothing to throw suspicion on his truthfulness except the testimony as to his statements different from those made, as a witness on the stand. He appears to be a somewhat prominent business man of Chico, and to hold one of the most important city offices.

No two witnesses seem to have heard the same conversation. Loose conversations, heard and considered from different standpoints, are liable to be misunderstood, or misinterpreted, as well as misremembered, after the lapse of considerable time. Noonan, certainly, ought to know, what he intended to say. If he intended to disregard his own convictions, and do an act which he acknowledged at the time, to be both wrong and cowardly, it seems, highly improbable, if not impossible, that he would boldly declare his base and cowardly purpose, to the man he was about to injure by such action. I cannot help thinking, that, there must have been some misapprehension, as to what he did say, or intended to say, or some misrecollection of his language. At all events, in the face of his formal official report, and action, and his positive testimony on the stand as to what he intended to say, and what he did, in fact, say, the testimony in regard to loose conversations on the occasions referred to, by the other witnesses, whose views and sympathies

were with the other side, and who viewed the matter from a different standpoint, is, scarcely, sufficient to brand Mr. Noonan with acting in bad faith, and perpetrating a deliberate fraud upon complainant by reporting himself as not being satisfied, when, in fact, he was satisfied, or to convict him of deliberate perjury in support of his action. The burden of showing by preponderating evidence, that he did this act, in bad faith, and in fraud of the plaintiff's rights, is on the plaintiff.

There were other witnesses who did not think the engine came up to the specifications, in its performance. Although it is not without some hesitation, I am disposed to think, upon the whole, that the committee ought to have been satisfied, and accepted it. Yet, it must be confessed, I think, that there might well be an honest difference of opinion upon the subject. I cannot, therefore, find, upon the evidence, that Noonan was, in fact, satisfied with the performance of the engine, or satisfied that it came fully up to the guaranty in its performance. The first trial was conceded to be a failure, and was stated by some witnesses to be a lamentable one.

In order to make the final test a success, it was necessary to send to the neighboring city of Marysville, both for the quickest coal for fuel, that could be had, and for an engineer of long experience with this kind of engine, to manage it. Some of the witnesses said, it took three men to fire her during the trial, one to break the coal into small pieces, and two to supply the engine. Some witnesses on the other side, said the door was open a considerable portion of the time; others did not see the door open except when necessary to put in coal, although in a position to see such occurences. Undoubtedly, it required the most favorable conditions, and most earnest and persistent efforts, to make the test a success; and from the testimony, it may well be doubted, whether in actual practice at fires the performance would come fully up to the requirements of the guaranty. Under all the circumstances, however, I am inclined, upon the whole, though with considerable hesitation, to think that the committee ought to have been satisfied, yet upon all the evidence, I cannot say that it has been, satisfactorily, proved by a preponderance of evidence, that Noonan was, in fact, satisfied, and, notwithstanding his convictions, in bad faith, fraudulently, reported that he was not satisfied. I must, therefore, reject the hypothesis sought to be maintained on this point, and relied on by plaintiff.

There is no claim that the other member of the committee, who acted with Noonan, did not act in strict accordance with his convictions.

As the engine was to be furnished "*subject* to the approval of the fire committee," and its "performance" "warranted" to be "satisfactory to them," or "to be removed without expense to the town," and it was *not* approved by them, and its performance *was not satisfactory* to them, there can be no recovery on the contract.

It is clear to my mind, from the evidence, that there was no act ceptance of the engine on the part of the town of Chico, and no ac- of the defendant, or its officers, by which it is estopped from denying the liability of the defendant on the contract, or otherwise.

As there is no appeal, I have considered the case with great care, in order to reach a correct conclusion, and I am constrained to say, that in my judgment, the plaintiff is not entitled to recover; and that judgment must be rendered for defendant. Let a general finding be drawn in favor of defendant, and judgment be rendered accordingly.

SUPREME COURT OF UTAH.

CUNNINGHAM *v.* UNION PACIFIC RAILWAY CO.

Filed August 28, 1885.

NEGLIGENCE—DUTY TO KEEP PREMISES IN REPAIR—PRESUMPTIONS.—Whenever it is a defendant's duty to keep premises in a proper condition, as respects persons passing, and they are out of condition and an accident happens, it is incumbent upon the defendant to show that he used that reasonable care and diligence that he was bound to use; and the absence of that care may fairly be presumed from the fact that there was the defect from which the accident had arisen.

EVIDENCE—WHEN CASE MUST BE LEFT TO JURY.—When the evidence has a tendency to make out a proper case in all parts, although, in the opinion of the trial court, it may be slight, inconclusive and far from satisfactory, yet it should be submitted to the jury, whose province it is to consider and determine its tendency and weight.

CONTRIBUTORY NEGLIGENCE—SITTING DOWN IN MINE.—A miner is not, as a matter of law, guilty of contributory negligence, in sitting down in a gangway, which it was the duty of his employer to keep in a safe condition, and which he did not know was unsafe.

NEGLIGENCE—EXHIBITING INJURY TO JURY.—In an action to recover for a bodily injury, caused by the defendant's negligence, the plaintiff may exhibit the injured portion of his body to the jury.

THE SAME—UNSAFE CONDITION OF MINE—LIABILITY OF MASTER.—Where it is the duty of a mine owner to keep his mine in a safe condition, and an injury happens to an employee, by reason of a failure so to do, the rule which exempts the master from liability for injury to a servant, caused by the negligence of a fellow servant, does not apply.

NEGLIGENCE—GENERAL ALLEGATION—EVIDENCE OF PARTICULARS.—Under a general allegation of negligence, the circumstances constituting it may be proved, even though other circumstances particularly specified in the complaint are unproved.

THE REFUSAL TO GIVE INSTRUCTIONS REQUESTED IS NOT ERROR, if the instructions given properly cover the entire case.

APPEAL from the third district court. The opinion states the facts.

Williams & Young, for the appellant.

Sheeks & Rawlins, for the respondent.

POWERS, J. The defendant and appellant is the owner of a coal mine in Summit county, known as the Grass Creek coal mine, which it was working in February, 1882. On that date the plaintiff was in the defendant's employ as a coal miner, and, in order for him to get to his work, he was compelled to pass through a drift or gangway. The plaintiff claims that this drift or gangway was carelessly constructed by the defendant, and that the defendant had negligently failed to secure the sides, roof and pillars by timber or otherwise,

and that it was unsafe, which fact was known to defendant. The defendant in its answer denies all this.

On the trial in the court below the plaintiff secured a verdict of five thousand dollars, and the case is brought here for review on appeal from the judgment.

The testimony on the part of the plaintiff tended to show that the mine in question is run down upon an incline of thirty or thirty-five degrees. That after the incline runs down two hundred feet the first level is reached, from which gangways extend, east and west. Two hundred feet farther down the second level is reached with similar gangways. In February, 1882, the east gangway on the second level extended about one thousand feet. Along this gangway are rooms which are numbered. The gangway is about ten feet high and about eleven feet wide. Just previous to February, 1882, the plaintiff had been assigned to work as a miner in one of the rooms of the east gangway. The foreman gave him work to perform, and he was paid by the yard for mining the coal.

On the last day of January, plaintiff had completed his job, and on the evening of February 1, he went down for the double purpose of seeing his work measured and of obtaining a new job. Feeling tired from taking down some heavy drills, he sat down, with two others, to rest by the mouth of the room in which he had been at work, with his back against a pillar. A large quantity of coal fell on him from the pillar, which crushed his leg and badly injured his spine. The testimony also tended to show that if the gangway had been protected by timbers the accident would not have happened, and that the fact that it was dangerous could have been ascertained by the defendant.

The plaintiff had no knowledge that the gangway was unsafe, and he testified that, in coal mines, the miners rely upon the company to make the gangway safe. It appears that the company was engaged in "robbing" the pillars that supported the roof; that is, taking coal from the pillars.

The side of the mine where the plaintiff was working was undergoing what is called a "crush." The weight of the roof was crushing the pillars. It is usual to leave the pillars about one-half. That is, the pillars are left the same size as the entrance between; but in this mine the pillars had been robbed until they were but little more than one-third.

The defendant claimed that everything had been done that was required to make the mine safe; that the mine had been managed with care and fully inspected day by day.

I. The first point made by the learned counsel for the defendant, is, that the evidence was insufficient to justify the verdict; that no negligence was shown on the part of the defendant. There is evidence in the record tending to show that if the walls had been timbered the accident would not have occurred, and that if the defendant had exercised reasonable diligence it would have discovered that the roof was unsafe. The accident occurred in a gangway used

as a highway in going to and from the workings of the mine, and as a place of resort for safety when blasts were made. The plaintiff had nothing to do with inspecting the gangway. The testimony on the part of the plaintiff shows that it was the duty of the defendant to see that it was safe. The fact of the coal falling in the manner it did, a thing not ordinarily happening, as the record shows, if reasonable diligence is employed in inspecting and keeping the gangway safe, would raise a presumption of negligence on the part of the defendant. Whenever it is a defendant's duty to keep premises in a proper condition, as it respects persons passing, and these are out of condition, and an accident happens, it is incumbent upon the defendant to show that he used that reasonable care and diligence which he was bound to use; and the absence of that care may fairly be presumed, from the fact that there was the defect from which the accident had arisen: Kearney v. London & C. R. R. Co., L. R., 5 Q. B., 411; 6 Q. B., 759; Byrne v. Boadle, 2 Hurl. & Colt., 722; Gee v. Metropolitan Railway Company, L. R., 8 Q. B., 161; Edgerton v. N. T. & H. R. R. Co., 39 N. Y., 227; Curtis v. Roch. & Syracuse R. R. Co., 18 N. Y., 534; Mullen v. St. John, 57 N. Y., 570; Roberts v. Johnson, 58 N. Y., 613; Seybolt v. R. R., 47 Am. Rep., 75; Feital v. R. R. Co., 12 Am. Rep., 720; Gray v. Boston Gaslight Co., 19 Am. Rep., 324. But, in this case, there is evidence from which negligence upon the part of the defendant might be inferred. At least, there was sufficient to submit to the jury. The coal which fell, had been left overhanging the gangway some three feet. This the foreman of the mine knew, but he took no steps to remove it or to protect it by timbers. He was aware that coal hanging from the roof, though it might seem safe one moment, was liable to fall the next. It was his business to report the condition of the mine from day to day, to the superintendent, and it will be presumed that he did his duty.

It was, therefore, proper for the jury, in view of all the facts, to find whether the defendant had been negligent or not. Under our system of jurisprudence, it is the province of the jury to pass upon the facts. It is not only their privilege, but their right, to judge of the sufficiency of the evidence introduced to establish any one or more facts in the case on trial. The credibility of the witnesses, the strength of their testimony, its tendency, and the proper weight to be given it, are matters peculiarly within their province. The law has constituted them the proper tribunal for the determination of such questions. To take from them this right, is but usurping a power not given. The jury should be left entirely free to act according to their own judgment. When there is a total defect of evidence as to any essential fact, or a spark, a scintilla, as it is termed, the case should be withdrawn from the consideration of the jury; where, however, the evidence introduced has a legal tendency to make out a proper case in all its parts, then, although it may, in the opinion of the trial court, or the appellate court, be slight, inconclusive, and far from satisfactory, yet it should be submitted to

the jury whose proper province it is to consider and determine its tendency and weight: Conely v. McDonald, 40 Mich., 158; Ryder v. Wombwell, Law Rep., 4 Exch., 38; Commissioners v. Clark, 94 U. S., 284; Schuchardt v. Allens, 1 Wall., 369; Drakely v. Gregg, 8 Wall., 268; Hickman v. Jones, 9 Wall., 201; Ins. Co. v. Rodel, 95 U. S., 238; Kelly v. Hendrie, 26 Mich., 256; Blackwood v. Brown, 32 Mich., 107.

II. The next point made by the respondent is that the plaintiff was guilty of contributory negligence in sitting down where he did in the mine. It is conceded that he had a right to pass along the gangway in the ordinary course of business, but it is contended that he had no right to lounge there. It will be remembered that the plaintiff had come down into the mine for a double purpose; first to have his work measured, and second to secure a new job.

He had reached the mouth of the room where he had been at work, and sat down to await the arrival of the foreman. He was there on legitimate business, and he had a right to sit down and wait. The gangway was supposed to be kept safe by the company. He was unaware of any defect in it and we do not think such negligence was shown on his part as to bar his recovery. The most that can be said is that reasonable minds might differ as to whether he was negligent or not, and the question would therefore have to be determined by the jury.

III. The court below permitted the plaintiff to exhibit the injured foot to the jury and this is alleged to be an error. While, of course, the trial court should be careful and not allow improper matters to be brought to the attention of the jury, the exhibition of the injured foot can hardly be called improper, for, as was said in the case of Mulhado v. R. R., 30 N. Y., 370: "Such exhibition certainly tended to make the description of the injury more intelligible and it cannot be supposed that it could have had any undue nfluence upon the feelings or sympathies of the jury. As well might it be contended that a man who had lost an arm or a leg by a similar injury, should not be permitted to appear before a jury and testify in relation to it, least thereby their feelings might be influenced, and under the undue excitement created thereby they might do injustice. We cannot assume that any such consequences will follow such a course of examination, and we cannot perceive that it was objectionable in the present instance." See Wharton's Evidence, sec. 346.

IV. Another point made is, that if negligence was the cause of the injury, it was the negligence of the foreman, a fellow-servant of the plaintiff. The foreman had the entire charge and superintendence of the mine underground. Notice to him was notice to the company, and his neglect was the neglect of the company: Brabbitts v. Chicago, etc., R. R. Co., 38 Wis., 289; Malone v. Hathaway, 64 N. Y., 5-9; Mullan v. Philadelphia R. R. Co., 78 Penn. St., 25; Hofnagle v. N. Y. C. R. R., 55 N. Y., 608. The testimony shows that it was the duty of the defendant to keep the gangway

safe; that the plaintiff had nothing to do with the gangway, and that he was unaware of the existence of the overhanging coal. It being the defendant's duty to exercise reasonable diligence in keeping the gangway in a safe condition, it could not absolve itself of that duty by delegating it to others: Cooley on Torts, 549, 557, 560; Hough v. R. R. Co., 100 U. S., 213; Corcoran v. Holbrook, 59 N. Y., 517; Holden v. Fitchburg R'y Co., 37 Am. Rep., 343, 348, 349; Indianapolis, etc., R. R. Co. v. Flanigan, 77 Ill., 365; Chicago & Iowa R'y Co. v. Russell, 33 Am. Rep., 54.

This point was very carefully considered by this court in the case of Bowers v. Union Pacific Railway Co., 6 West Coast Rep., 726, decided at the January term, 1885, and it was there held, that when it is the duty of a master to furnish sound material and machinery, and defective machinery causes an injury to a servant, the rule which exempts the master from liability from injury to a servant, caused by the negligence of a fellow-servant, does not apply. The negligence is that of the company, and not of a fellow-servant. The principle thus laid down applies with equal force to the case at bar. See also Trask v. California S. R. Co., 63 Cal., 96; Belson v. Green Mountain G. M. Co , 57 Cal., 20.

For the court, under the facts of this case, to have charged the jury, as requested by the defendant, that if the accident was occasioned by the negligence of the foreman, the plaintiff could not recover, would have been error: Chicago & Milwaukee R. R. v. Ross, 112 U. S., 337; Moore's Admr. v. R. R., 49 Am. Rep., 401; R. R. Co. v. Swansen, 49 Am. Rep., 718.

V. The plaintiff's complaint alleges that "the defendant so negligently and carelessly dug, constructed and kept said gangway, by its negligent failure to timber or otherwise secure the sides, roof, walls and pillars or supports thereof, that the same was, at the time of the injury hereinafter mentioned, dangerons and unsafe; all of which the defendant then and there knew, and of which plaintiff was then and there ignorant." The defendant argues that, under this allegation, the court permitted the plaintiff to show that the cause of the accident was the stripping of the pillars, which so weakened the support that there was a general "crush" in that part of the mine, which caused the injury.

The testimony, the defendant claims, was improperly admitted under the pleadings. The answer to this is, that if the plaintiff could show that the pillars were insufficient to support the weight upon them, then it became the duty of the defendant to do what a prudent man would do, proceed to timber the walls and roof. Besides, under a general allegation of negligence, the circumstances constituting it may be proved, even though other circumstances particularly specified in the complaint are unproved: Abbott's Trial Evidence, 583; Edgerton v. N. Y. R. R. Co., 39 N. Y., 227.

VI. The case was properly left to the jury to determine, as a question of fact, whether or not the plaintiff was guilty of negligence, or whether the injury was caused by the negligence of the

defendant: Bowers v. Union Pacific Railway Co., 6 West Coast Rep., 726; Davis v. Utah Southern R. Co., 3 Utah, 218; 2 Thompson on Negligence, 1,010, 1,011, 1,012, 1,015; R. R. Co. v. Stout, 17 Wall., 615; Thurber v. R. R. Co., 70 N. Y., 327; Conroy v. Iron Works, 62 Mo., 35; Dorsey v. Phillips & Colby Construction Co., 42 Wis., 583; 76 Penn. St., 393, 394. The charge of the court covered the whole case, so as to fairly submit it to the jury, and, therefore, although some of plaintiff's requests to charge were technically good law, it was not error to refuse to give them: Idianapolis & St. Louis R. R. v. Horst, 93 U. S., 291. When the charge given by the court below covers the entire case, and submits it properly to the jury, such court may refuse to instruct further. It may use its own language, and present the case in its own way: United States v. Musser, 7 West Coast Rep., 116, June term Utah Sup. Ct., 1885.

We find no error in the record, and the judgment, therefore, is affirmed, with costs.

ZANE, C. J., and BOREMAN, A. J., concurred.

WEST COAST REPORTER.

WHOLE NO. 91. SEPTEMBER 24, 1885. VOL. VII. NO. 11.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

FISHER ET AL. *v.* CONSOLIDATED AMADOR MINE, ETC.

September 7, 1885.

PATENTS FOR INVENTIONS—PRIOR RECOVERY.—In an action at law, by a patentee, to recover damages for the use of a patented article, an answer which sets up, that the article used was purchased by defendant from a manufacturer, against whom the patentee had brought a suit in equity, and obtained a decree for an accounting, in which accounting and decree the article in question was included, does not state a defense, unless there is a further allegation, that the decree against the manufacturer has been satisfied by payment, or otherwise.

DEMURRER to a special answer.

Langhorne & Miller and *W. H. H. Hart*, for plaintiff.

J. A. McKenna, for defendant.

SAWYER, CIRCUIT JUDGE. This is a demurrer to a special answer. The action is brought, to recover damages for the unlawful use of certain hydraulic machines, which are alleged to infringe upon reissued letters patent number eight thousand eight hundred and seventy-six, owned by plaintiffs. The answer sets up, that the same plaintiffs had, previously, brought suit in equity against one Hoskins, to recover the profits resulting from an infringement of the patent by Hoskins, in manufacturing, and selling, machines constructed according to the specifications of the patent; that a decree had been rendered in that case in favor of plaintiffs, and against Hoskins, and upon an accounting had, the sum of sixteen thousand four hundred and sixty-five dollars and thirty-three cents had been awarded to plaintiffs as the profits realized by Hoskins from manufacturing and selling said machines. The answer, further, alleges, that the particular machines used by the defendant, and, for the use of which, the present action is brought, were purchased by defendant from Hoskins, and, that the profits of their manufacture and sale had been included in the decree against Hoskins, and, that, therefore, the plaintiffs had received satisfaction for the said machines, and defendant was not liable to plaintiffs for using the same.

But the answer nowhere alleges, that the Hoskins decree has ever been satisfied by payment, or otherwise. In order to be a defense, it must allege that said decree has been paid, or otherwise satisfied, as well as, that the accounting against Hoskins included the machines in question. In the absence of such allegation, the answer does not state a defense: Gilbert & Barker Mf. Co. v. Bussing, 1 Bann. &

Ard, 621; Birdsell v. Shaliol, 112 U. S., 485; Steam Stone Cutter Co. v. Sheldons, 21 Fed. Rep., 875; Walker on Patents, sec. 314.

It follows, therefore, that the demurrer must be sustained, and it is so ordered.

If the defendant desires, it can have time to amend, though I cannot see, that it can properly amend, unless it can truthfully state that the decree has been satisfied, and I have good reason to know, that it has not been satisfied.

SUPREME COURT OF UTAH.

RUSSELL ET AL. *v.* HARKNESS.

Filed September 11, 1885.

CONDITIONAL SALE—TITLE RETAINED BY VENDOR—PERFORMANCE OF CONDITION.—The vendee, in possession under a conditional sale, by the terms of which the title was to remain in the vendor, until payment of the purchase price, cannot sell the property, so as to pass title to the purchaser, until the condition has been performed.

APPEAL from a judgment of the district court. The opinion states the facts.

Kimball & Heywood, for the appellant.

Bennett, Harkness & Kirkpatrick, for the respondent.

ZANE, C. J. It appears from the findings of the district court, that on the second day of October, 1882, the plaintiff entered into the following contract with Phelan & Ferguson: "On or before the first day of May, 1883, for value received in one sixteen-horse power engine and boiler, number one thousand twenty-six hundred, and a portable saw mill, complete, number one hundred and twenty-seven, bought of L. B. Mattison, agent of Russell & Co., we, or either of us, promise to pay to the order of Russell & Co., Massilon, Ohio, three hundred dollars, payable at Wells, Fargo & Co's bank, Salt Lake City, Utah territory, with ten per cent interest per annum from October 1, 1882, until paid, and reasonable attorney's fees, or any costs that may be paid or incurred in any action or proceeding instituted for the collection of this note, or enforcement of this covenant. The express condition of this transaction is such, that the ownership or possession of said engine, boiler and saw mill does not pass from the said Russell & Co. until this note and interest shall have been paid in full, and the said Russell & Co. or their agents, have full power to declare this note due and take possession of said engine, boiler and saw mill when they may deem themselves insecure, even before the maturity of this note; and it is further agreed by the makers hereof, that if said note is not paid at maturity, that the interest shall be two per cent per month from maturity hereof till paid, both before and after judgment, if any should

be rendered. In case said engine, boiler and saw mill shall be taken back, Russell & Co. may sell the same at public or private sale, without notice, and apply the proceeds on the note, or they may, without sale, endorse the true value of the property on this note, and we agree to pay on the note any balance due thereon after such endorsement, as damages and rental of said machinery; as to this debt, we waive the right to exempt, or claim as exemption, any property, real or personal, we now own, or may hereafter acquire, by virtue of any homestead or exemption law, state or federal, now in force, or that may hereafter be enacted."

The court also found that plaintiffs were, at the time of the contract, the owners of the engine, boiler and saw mill described above, and another engine, boiler and saw mill, all described in the complaint, and that they were of the agreed value of four thousand nine hundred and eighty-eight dollars at the date of the contract, a small portion of which was paid in cash; that Phelan & Ferguson gave seven notes for the remainder due on the first days of May, August and November, 1883, and the first days of May, August and November, 1884, and February 1, 1885; that each of the notes were in the same form as the above, differing only in amount, date of maturity, and in description of the property; that Phelan & Ferguson took possession of the property in Idaho, where it was at the date of the contract, and remained in possession until the second day of December, 1882, and then sold and delivered the same to the defendant, in part payment of an indebtedness due him and one Longsdorf. The court also found that defendant knew at the time he received the property that it had not been paid for by Phelan & Ferguson, and that plaintiff claimed title thereto; that Phelan & Ferguson were, at the date of their contract, residents of Idaho; that the value of the property on the second day of December, 1882, was one thousand six hundred dollars, and that nothing had been paid on the notes. It also appears there was a chattel mortgage act in Idaho, which, among other things, provided that chattel mortgages should not be valid, except between the parties, unless made, executed and recorded in conformity with that act, and that no such mortgage was executed to the plaintiff.

The defendant insists that the terms and conditions of the contract manifest an intention to create a secret lien on the property, and should be construed to be a chattel mortgage, and invalid because not executed and recorded according to the Idaho statute. The plaintiff claims that the intention was, as shown by the contract, that plaintiff should retain the title unless payment should be made according to the terms of the notes, and that the purchaser should have a right to the possession and use of the property until the seller should feel insecure, or until default in payments.

The intention of the parties, as expressed in the contract, evidently was to give to the purchaser the possession and use of the property until the seller should feel insecure for reasonable cause; or until payment according to the notes. In the latter case, the purchaser

was to have the title also, and in case of default in payment the right to have the proceeds of the sale, or the value of the property, credited on the notes; and the seller was to have the price with interest according to the notes, and for security the title with the possession of the property, if he felt insecure for reasonable cause, and the further right to sell the property, and to credit either the proceeds or the value of the property without sale, and also the right to collect the difference, and retain the same as damages, in case the proceeds should be less than the amount due.

By this contract the vendor expressly retained the title to the property. This right cannot be likened to a lien. A lien is a claim which one person has on the property of another, as a security for some debt or charge; "it is not, in strictness, either a *jus in re* or a *jus ad rem;* that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing; it more properly constitutes a charge upon the thing." Nor can it be construed as a mortgage. A mortgage is made by the person having the property or title, to another for security. Herford v. Davis, 102 U. S., 235, cited by defendant's counsel, was a sale of certain cars to a railway company in Missouri. The contract, in some respects, is like the one in hand; in others, not. The parties to it characterized the transaction as a loan of cars for hire, when it clearly was not. The notes executed were all due within four months. This contract gave a much longer time. In that case, collateral security in bonds to a larger amount than the notes secured was taken, and in the receipt given the seller acknowledged that he received the bonds as collateral security for the notes given in payment for the property. In this no collaterals were taken. And by the contract in the case cited the proceeds of the sale, in case they exceeded the notes, were to be paid to the purchaser. In this the vendor retained such surplus as damages. In the case cited, the court held that the contract passed the title to the purchaser; that it did not amount to a lease or a conditional sale, and that it was invalid as a mortgage. Hervey *et al.* v. Rhode Island Locomotive Works, 93 U. S., 664, a case taken up from Illinois, involved the construction of a contract similar to that in the case of Herford v. Davis, *supra*. This contract also professed to be a lease, but the court held that it clearly was not, but did not determine whether it was a conditional or an absolute sale. The court followed the decisions of the courts of Illinois in construing the chattel mortgage act of that state, and held the contract invalid as to third parties obtaining interests in property under the purchaser. The contract in the case of Call v. Seymour, 40 Ohio St., 670, is more analogous to the contract in hand, except that it did not give the vendor authority to credit the value of the property on the notes without a sale, or to collect as damages the difference, if any, between the proceeds or value of the property and the amount of the notes. The court held that the contract constituted a conditional sale, and was binding upon the vendee and all persons acquiring an interest in the property under him.

Russell & Co. were the owners of the property with respect to which this contention has arisen. They sold upon condition that they were to retain the title unless the consideration should be paid at the times agreed upon, and the possession was given to the purchaser. It differs from a contract in which the parties agree that the creditor shall take the title as security, the debtor retaining the possession. The possession remains the same. Possession and its change involve actions and are accompanied with circumstances which do not attend the mere change of title and ownership without possession. The presumption of ownership from former possession and title is added to the presumption from present possession, and therefore more likely to mislead persons wishing to deal with the vendee with respect to the property. The change of possession is more likely to be known to third parties than the mere change of title. Nor is the contract now in question like one in which a stock of goods is sold to a merchant for retail, the seller retaining the title and giving possession to the purchaser. Retailing the goods is an indication of ownership in addition to that of possessing. Nor is this contract like one by which property which is consumed in its use for consumption (as of provisions) is sold on the condition that the title shall pass upon payment. Possession is indicated by acts incident to it, and consumption by those incident to it. The rights of consumption and the right of possession each indicate ownership and both are of more weight than either.

Courts have sustained contracts belonging to each of these three classes. They have held that the purchaser of the debtor as well as the debtor himself is bound when the latter, by agreement, in good faith puts the title to his property in his creditor as security; and that the possession in the case named with the mere right to sell at at retail cannot, as against his vendee, pass the title in any other way. That the right to consume in the case named gives no authority to dispose of by sale. That the right of the purchaser of the vendee, the consumer in such case, is subject to the right of the person holding the title according to the first contract.

The courts of Illinois and some other states, hold that conditional sales of the class involved in this case are invalid as against creditors and purchasers of the conditional vendee. The purpose of the rule is to prevent fraud. The argument against such sales is, that possession of personal property is evidence of ownership, and to intrust persons with that evidence without the title, gives them the means of defrauding and imposing upon others. This argument may also be made against loans, bailments and leases of personal property. But it has been uniformly held that the purchaser of the borrower, the bailee or lessee, take subject to the rights of the vendor, or the bailor, or the lessor.

In considering this contract, we may refer to some general principles. Every person competent to contract is presumed to know that possession alone is not sufficient to confer title as against the owner, and if the purchaser relies upon it without inquiry, he does

it at his peril. The law construes contracts according to the intention of the parties, and allows them to contract with whomsoever, and upon whatever terms they may desire. A man should have a remedy according to his agreement, and should not be held to have trusted where he never intended to trust. The logic of these principles clearly sustains the rights of the conditional vendor against those of the purchaser of his vendee.

In an early case in Massachusetts, Coggill v. Hartford & N. H. R. R. Co., 3 Gray, 545, Bigelow, J., said: "The vendee in such cases, having no right to the property, can pass none to others. He has only a bare right of possession, and those who claim under him, either as creditors or purchasers, can acquire no higher or better title; such is the necessary rule of carrying into effect the intention of the parties to a conditional sale and delivery. There is no good reason or equity in placing the burden of a fraudulent sale by a vendee in violation of the condition on which he received the property upon a bonafide vendor, rather than upon a bonafide purchaser. On the contrary, if either is to lose by his fraudulent act, it should be the latter, who has dealt with a party having no authority, instead of the former, who relies upon a valid subsisting contract as the foundation of his claim. It is the duty of the purchaser to inquire and see that his vendor has a good title to the property which he undertakes to sell."

From the terms and conditions of the contract between the plaintiffs and Phelan & Ferguson, we are of the opinion that their intention was that the title to the engines, boilers and saw mills, should not pass to the latter until the price agreed upon should be paid by them according to the notes given. And we hold that plaintiff's title must prevail over the claim of the defendant. These conclusions, we think, are supported by reason, and stand upon principle. They appear to be in harmony with the weight of authority: Brown v. Haynes, 52 Maine, 578; Rogers v. Whitehouse, 71 Maine, 222; Kimball v. Jackson, 42 N. H., 242; Fish v. Ewen, 46 N. H., 173; Armington v. Houston, 38 Vt., 448; Coggill v. Hartford & N. H. Ry. Co., 3 Gray, 545; Burbank v. Crocker, 7 Gray, 158; Goodell v. Fairbrother, 12 R. I., 233; Cragin v. Coe., 29 Conn., 51; Heine v. Roberts, 48 Conn., 267; Ballard v. Burgett, 40 N. Y., 314; Cole v. Mann, 62 N. Y., 1; Parmlee v. Catherwood, 36 Mo., 479; Ridgway v. Kennedy, id., 24; Hall v. Draper, 20 Kansas, 137; Cole v. Berry, 13 Vroom (N. J.), 308; Coure v. Frequest, 11 Mich., 65; Whitney v. McConnell, 29 id., 14; Knowlton v. Redinbaugh, 40 Iowa, 114; Sumner v. Woods, 67 Ala., 139; Hunter v. Warner, 1 Wis., 141; Pitts v. Owen, 9 id., 152; Robler v. Hayes, 41 Cal., 455; Cardinal v. Edwards, 5 Nev., 36; Singer Manf. Co. v. Graham, 8 Or., 17; Call v. Seymour, Ohio St., 670; Bradshaw v. Warner, 54 Ind., 58; McGinn v. Sell, 60 id., 249; Benjamin on Sales, 4th Am. ed., vol., secs. 309, 437, 439, 442, 443.

The judgment of the district court is affirmed.

EMERSON, J., and TWISS, J., concurred.

SUPREME COURT OF WASHINGTON TERRITORY.

PARKER v. D'ACRES.

Filed July 14, 1885.

APPEAL—DISMISSAL—ASSIGNMENT OF ERRORS.—An appeal in an action at law, brought under the act of 1883, will be dismissed if the plaintiff in error fails to serve a copy of assignment of errors on the adverse party within the time limited by rule v. of the supreme court.

MOTION to dismiss an appeal. The opinion states the facts.

A. E. Isham, for the plaintiff in error.

B. L. & J. L. Sharpstein, for the defendant in error.

GREENE, C. J. This cause has been brought here under the provisions of the appeal act of 1883, which allow all cases, of whatever jurisdiction, to be taken to this court by the simple service of a notice of appeal given and entered in the lower court. The uniformity of mode of procedure prescribed by that act does not do away with the essential distinctions between causes of law and causes in equity for purposes of review. Rule v. of this court, in view of these distinctions, and to facilitate the business of the court, and to harmonize the appellate practice under the act of 1883 with that under the code, has provided, in substance, that in all law causes brought up under the act of 1883, an assignment of errors shall be made in writing and filed with the clerk of the proper district court, to be certified to this court as a part of the record, and that a copy of such assignment shall be served on the adverse party within twenty days after the entry in the journal of the district court of the notice of appeal. Plaintiff in error did not serve a copy of assignment of errors in this cause within the time limited, and on that ground defendant in error moves to dismiss the appeal. No good reason for denying the motion appears. Doubtless, rule v., ever since its adoption, has been part of the law applicable to suitors in this court, without regard to when it first was published in print.

Let the motion to dismiss the appeal be granted.

HOYT, A. J., and TURNER, A. J., concurred.

MEEKER v. GARDELLA ET AL.

Filed July 15, 1885.

APPEAL UNDER ACT OF 1883—EVIDENCE, HOW BROUGHT UP.—Where a case is appealed, under the act of 1883, the evidence taken in the lower court, must be brought up in compliance with the provisions of that act.

APPEAL from the second district court. The opinion states the facts.

Arthur Meeker, for the appellant.

Judson & Burke, for the appellee.

GREENE, C. J. This is a motion to strike the evidence from the files of this court and dismiss the appeal. From inspection of the transcript, we find that notice of appeal was regularly given and entered of record in the lower court, conformably to the appeal act of 1883, and that afterwards proceedings were instituted with a view to taking and perfecting an appeal under the provisions of the code. In course of these latter proceedings, and in regular form, this mass of evidence has been certified to this court by the clerk of the court below as written evidence.

The evidence could not, in our opinion, be so certified. If it was to be brought up at all, it should have been removed here by compliance with the provisions of the act of 1883. After notice of appeal duly given and entered in the lower court, there remained in that court no cause that could be appealed under the code.

But the inadmissibility of this mass of evidence is no ground for dismissing the appeal, although the exclusion of it may render the appeal inefficacious.

Let the motion, so far forth as it calls for the striking out the evidence, be granted, but, so far forth as it asks for dismissal of the appeal, be denied.

WINGARD, A. J., and TURNER, A. J., concurred.

CARROLL v. ANDREWS.

Filed July 15, 1885.

MOTION TO STRIKE OUT BRIEF FOR NONCOMPLIANCE with rules viii. and ix., denied.

MOTION to strike out brief of defendant in error. The opinion states the facts.

P. P. Carroll, in propria persona, for the defendant in error.

C. W. Hartman, for the defendant in error.

BY THE COURT. We are disposed to sustain the points made by the plaintiff in error, so far as to hold that there has been a noncompliance, on the part of defendant in error, with rule viii. and ix., in failing to set out in his citations the names of volumes and titles

of cases without abbreviation, and to place the title of the cause and endorsements on the left half of the back cover of the brief. But no showing by affidavit, as was necessary, has been made as a basis for the point that there is a culpable failure to specify the number of the edition of any text-book cited. We do not understand the rule to require that the christian names of parties, nor the names of all parties to cases cited, should be set out.

It seems to us that to strike the faulty brief from the files would, in this instance, be too heavy a penalty to visit upon the offending party. It will be sufficient to impose, as terms for allowing the briefs to remain on file, the costs of the briefs.

Accordingly, we shall order that no costs for briefs shall be taxed in this cause in favor of defendants in error.

SAYWARD v. GUYE ET AL.

Filed July 17, 1885.

AN APPEAL WILL BE DISMISSED IF THE TRANSCRIPT FAILS TO SHOW that notice of appeal was filed with the clerk of the court in which the judgment appealed from was entered.

APPEAL from the district court, Seattle.

Struve, Haines & McMicken, for the appellant.

Burke & Haller, for the appellees.

HOYT, A. J. Appellees, having in their brief properly reserved the right so to do, now move the court to dismiss the appeal herein, because it does not appear that notice of the appeal was ever made or filed with the clerk of the court in which the judgment appealed from was entered, and cites, in support of said motion, the ruling of this court in the cause of Crawford & Harrington v. Haller, made at the July term, 1883, and it is claimed by them that the said notice of appeal has the same, and no other, authentication as the one in the case above cited, and that if that decision is to be adhered to, then there is no proof in this cause that any notice of appeal was ever given or served herein, and this position is practically admitted by the appellant. We have, moreover, looked into the record in the two cases, and we find them to be identical in regard to the matter involved in this question; and, as we are satisfied with the ruling then made, it follows that it will be adhered to, and this court will hold, now as then, that this transcript furnishes no proof that the cause has ever been brought to this court.

In the case of Crawford & Harrington v. Haller, above cited, the court, upon cause shown, gave the appellants leave to supply proof of the facts necessary to show jurisdiction in this court; and in view of the fact that the question at issue had not before been decided by this court, and of the other circumstances of that case, much indulgence was probably merited. But here a different case is presented

Appellant presents such a transcript as this court has held to be insufficient to show jurisdiction, and when his attention is called to the particulars wherein such transcript is insufficient by the brief of opposite counsel, and to the cause, in which this court has so held, he still rests his case upon such faulty transcript, instead of taking steps to perfect the same, as he might easily have done by causing the clerk to file in this court a properly authenticated copy of the notice of appeal in said cause. We can, therefore, in this cause, extend a like indulgence to the appellant only by approving of the acts of a party in thus relying upon what he is duly notified has been held thus faulty, with the expectation that if the court again holds the same as it has before, it will allow him time, as a matter of pure grace, to do that which he could have easily done, and ought, in common prudence, to have done, as soon as his attention was called thereto, and this we are not willing to do.

It is, therefore, our opinion that the appeal herein should be dismissed, and it is so ordered.

TURNER, A. J., and WINGARD, A. J., concurred.

WILSON *v.* WALD ET AL.

Filed July 17, 1885.

GENERAL APPEARANCE—NOTICE TO DISMISS APPEAL.—A brief, in which appellees call attention to the nature of the action, to the character of the process by which the action is brought to the supreme court, and which contains a notice that the appellees will move to dismiss the appeal for the reasons stated, will not be construed as a general appearance.

MOTION to dismiss appeal. The opinion states the facts.

McNaught, Ferry, McNaught & Mitchell, for the appellant.

Hall & Smith, for appellee.

TURNER, A. J. This is an action at law. It was brought to this court, from the court below, by appeal taken under the provisions of the code of 1881. The appellees now move to dismiss the appeal on the ground that an action at law can be brought to this court for re-examination only by writ of error. The motion seems, to us, well grounded. It is contended, by the appellant, however, that the appellees, having filed a brief in the cause, in this court, without having given notice of a special or limited appearance, as provided for by rule xvii. of the court, are now precluded from taking the objection.

The appellees, in their brief, call attention to the nature of the action, and to the character of the process by which the action is brought to this court, and, before addressing themselves to the merits, give the following notice:

"And appellees here give notice that they will move the supreme court to dismiss the appeal for the reasons stated, which motion will be filed on or before the second day of the July term, 1885."

We think the notice thus given, a sufficient compliance with the rule of court in question. The appellant and the court are notified contemporaneously with the filing of the brief, that the appellees intend to insist upon the objection to the jurisdictional process. This is what the rule was intended to accomplish. The notice thus conveyed, is not in the form usually employed to limit to a special appearance what would, otherwise, amount to a general appearance, but form, while useful and proper to the observed, is not considered essential.

The appeal is dismissed.

WINGARD, A. J., and HOYT, A. J., concurred.

COLLINS v. CITY OF SEATTLE.

Filed July 17, 1885.

STATEMENT ON APPEAL—CERTIFICATION OF—A statement of facts, in an appeal taken under the act of 1883, must be certified as containing all the material facts in the cause. Otherwise, it will be stricken out.

AN ASSIGNMENT OF ERROR WILL NOT BE CONSIDERED unless it has been served upon the adverse party, or his attorney.

APPEAL from the district court. The opinion states the facts.

McGilvra & Burke, for the plaintiff in error.

C. H. Hanford, for the defendant in error.

WINGARD, A. J. The appeal to this court was taken under the act of 1883.

There is no certificate of the judge to the statement of facts that said statement contains *all* the material facts in the cause, nor the material facts in the cause.

The motion to strike it from the record is, therefore, sustained.

There is no assignment of errors in this case served upon the adverse party, nor his attorney, nor can the paper, claimed to be such assignment, be considered as a paper in the case.

The motion to affirm the judgment is, therefore, allowed.

For the reasons given in Wilson v. Wald & Campbell, announced this morning, July 17, 1885, we think there has not been a general appearance in the cause.

HOYT, A. J., and TURNER, A. J., concurred.

PUGET SOUND IRON COMPANY *v.* WORTHINGTON BROS.

Filed July 20, 1885.

JUDGMENT—NOTICE OF APPEAL—ENTRY OF.—Where judgment and notice of appeal are entered in the journal of the court upon the same day, it will be presumed that the notice of appeal was not given until after judgment.

DISMISSAL OF APPEAL—ASSIGNMENT OF ERRORS.—An appeal will not be dismissed on the ground that no assignment of errors has been made or served, if the record contains a proper assignment of errors, with a proper return of service, although the clerk omitted to mention such assignment in his certificate to the transcript.

STATEMENT OF FACTS MAY INCLUDE EXCEPTIONS TAKEN AT TRIAL.—A statement of facts, in an appeal under the act of 1883, may include everything material that transpired in the cause, not otherwise a part of the record. Exceptions reserved, need not be embodied in a regular bill of exceptions.

THE SAME—NOTICE OF SETTLEMENT OF STATEMENT.—Under such act, the party giving notice for the settlement of the statement of facts, need not serve upon the adverse party a copy of the proposed statement.

INSTRUCTIONS WILL NOT BE CONSIDERED ON APPEAL, unless they are contained in the statement of facts, or in a bill of exceptions.

A STATEMENT OF FACTS MUST BE CERTIFIED OR IDENTIFIED as the statement of facts in the cause, otherwise it will be stricken from the transcript.

APPEAL from the district court of Seattle. The opinion states the facts.

Jacobs & Jenner, J. R. Lewis and *Bradshaw & Sachs*, for the appellant.

Burke & Haller, for the appellees.

TURNER, A. J. The appellees move to dismiss this appeal, which was taken under the appeal act of 1883, because:

1. No notice of appeal from the final judgment in this cause or from any judgment therein was given or served.

2. No notice of assignment of error has been made or served.

1. The record shows that notice of appeal was given by the appellant in open court and entered upon the journal of the court as required by the act of 1883. This notice was given on the same day that the judgment was pronounced, but its entry upon the journal precedes the entry of judgment.

It is assumed by the appellees from this fact that the notice was given before the judgment was pronounced, and it is argued correctly from this assumption that the notice had no efficiency as a step in removing the cause to this court.

We do not think that the order in which the proceedings of the court upon the same day are entered in the journal, necessarily determines the order in which those proceedings occurred. These entries are but the history of past transactions, and in the absence of some indication to the contrary, it is proper to look to the sense of the different steps of the court, which are the subject of the entries, to determine their sequence, rather than to the order in which the clerk, performing a purely ministerial duty, makes note of those steps. The judgment and the notice of appeal having been entered in the journal upon the same day, and the latter naturally following the former in the correct and orderly prosecution of the suit, it will be presumed that the notice of appeal was not given until after judgment.

2. We find a proper assignment of errors, with a proper return of service upon the appellees, in the record. The clerk of the lower court in his certificate to the transcript, unnecessarily descended to particulars, and undertook to describe in his certificate each and every paper included in the transcript, and he omitted to include in that description the assignment of errors.

The objection of the appellees should have been to the certificate to the transcript. There *is* an assignment of errors in the record.

The form in which the objection is made is faulty, as being inaccurate, and as failing to inform the plaintiffs in error with certainty of the particular defect moved against.

The motion to dismiss is denied.

The appellees move to strike from the statement of facts in the cause all statements of exception to the rulings of the court allowed therein, because said exceptions were not saved in a regular bill of exceptions, as provided by the code, chapter xix.

The statement of facts provided to be settled by section 3 of the act of 1883, may include everything material that transpired in the cause not otherwise a part of the record.. This was obviously the intention of the legislature.

If a party wishing to appeal were required to preserve his exceptions by a regular bill of exceptions, the procedure by appeal under the act of 1883 would be more cumbersome than it was before the passage of that act. He would be required to present the judge with a bill of exceptions and statement of facts, where before he could have combined both his exceptions and his facts in his bill of exceptions.

Considering the spirit of the act of 1883, the language should be imperative to justify such a construction.

The exceptions were properly preserved in the statement of facts.

We do not mean to indicate an opinion that both the exceptions and the evidence may not be preserved by bill of exceptions, and be brought to this court with the balance of the record by appeal, under the act of 1883.

The appellees move to strike the statement of facts from the record for the reason that the notice for the settlement of the statement of facts served upon them was not accompanied by a copy of the proposed statement, and did not in any way indicate its contents to them, or in any other manner give them means to acquaint themselves with its contents.

The act of 1883 does not require anything more in this connection than notice by the appellant to the appellee, within thirty days after the rendition of the order or judgment desired to be reviewed, to appear before the judge upon a day named, which day shall not be less than ten days after the day of service of the notice, to settle and agree upon the facts. This is the plain requirement of the law—no more, no less. To import into it by the decision of the court the requirement that a copy of the proposed statement of facts shall accompany the notice, or that the original of the proposed

statement shall be lodged somewhere for the inspection of the appellee, would be to assume to ourselves legislative functions.

Counsel for appellees did not indicate clearly whether, in their opinion, they should have had a copy of the proposed statement, or whether the notice should have informed them that the statement should have been lodged with some other officer for their inspection. Considering the size of some of the statements of fact produced at the present term, to require a copy to be served in all cases would be an intolerable burden, which we are indisposed to hold that the legislature intended to impose, in the absence of explicit directions to that effect.

To hold that the original statement must be lodged with some one, would require us to evolve from our inner consciousness the particular individual or official upon whom this trust should be devolved. We cannot do it.

No doubt it would add efficacy to the act of 1883, to require the proposed statement of facts to be lodged with the clerk of the lower court for the inspection of the appellee, at the same time that the notice to settle the facts is given, and, probably, the court has power by rule, to require this to be done, for the future. But this notice is to be measured by the act of 1883 alone, and, measured by that, we deem it sufficient.

The motion to strike from the transcript what purports to be the instructions given and refused by the judge, is granted. These instructions are not included in the statement of facts signed by the judge, nor are they preserved by bill of exceptions. They are certified by the clerk as a part of the record. Manifestly, they are no part of the record, and they have no business in the transcript.

The appellees move to strike from the transcript the purported statement of facts, upon the further ground, not indicated in their brief, that it is a separate paper from the transcript, and is not certified or identified in any way, other than by its title, as the statement of facts in this cause.

The objection is made by appellant, that counsel should have noticed their defect in their brief, and, having failed to do so, are now precluded from moving against it; but, upon the authority of Mulkey v. McGrew, 5 West Coast Rep., 680, decided at the last term of this court, we hold the contrary.

Recurring now to the last objection to the statement of facts, we find that that document is a separate paper from the balance of the transcript, that it bears no file mark of the clerk of the lower court, and is accompanied with no evidence that it was transmitted to this court, with the transcript, by the clerk of the lower court, as the statement of facts in this cause.

The paper may be a statement of facts in some other cause. After having been settled, it may have been withdrawn by the parties. If it had been deposited with the clerk of the lower court, and that fact properly evidenced, we might presume, from the identity of the parties, that it belonged to this cause, and might presume further,

from the fact of its being here, that it had come here properly. In its present shape, we cannot consider it at all. Inasmuch as this objection was taken for the first time at the argument, we think the appellant should have an opportunity to cure the defect, and will order that the paper, purporting to be the statement of facts, be stricken from the transcript, unless appellant cause it to be properly certified by the clerk of the lower court, on or before July 27th inst., and. for this purpose, appellant may have leave to withdraw the same from the files of this court.

The appellant should have asked for this relief by cross-motion, and it is now granted by the court, *ex mero motu*, because of the informal manner in which the question was raised, and for the purpose of indicating the correct practice in such matters hereafter.

WINGARD, A. J., concurred.

COOMBS v. DAVIS ET AL.

Filed July 23, 1885.

TITLE CANNOT BE LITIGATED IN GARNISHEE PROCEEDINGS.—In garnishee proceedings, under section 182 of the code, the title to property in the hands of the garnishee, and claimed by him, cannot be litigated.

APPEAL from the first district court. The opinion states the facts.

T. J. Anders, for the appellant.

Allen, Crowley & Thompson, for the appellee.

TURNER, A. J. The appellant, as garnishee in the case of A. L. Davis & Son v. W. L. Coombs *et al.*, pending in the district court for the first judicial district, holding terms at Walla Walla, was required to appear before the judge of said court at chambers, as provided by section 182 of the code, to answer concerning property in her possession, or under her control, belonging to the defendants, or either of them, or in which they, or either of them, had any interest. Upon the examination before the judge, which followed, the appellant admitted having in her possession, notes and sewing machine contracts to the amount of over five thousand dollars, which had been endorsed and delivered to her by the defendants as security for the sum of thirty-five hundred dollars, which she testified she had loaned them on September 28, 1883. In response to questions upon the direct and cross-examination, she made a detailed statement of facts for the purpose of showing the manner in which she acquired the large sum claimed to have been loaned by her to the defendants, who were her husband and sons, and concerning her and their relations with the plaintiffs and their family. This detailed statement was not consistent in every respect, and tended very strongly to impeach the *bona fides* of the transfer to her of the notes and machine contracts.

Upon this state of facts the judge below made an order requiring the garnishee to deliver the said notes and machine contracts to the sheriff, the same to be collected by him and the proceeds to be applied to the satisfaction of any judgment that might be recovered by plaintiffs against defendants, and the residue to be returned to the garnishee.

The garnishee excepted to this order. The cause is here under the appeal act of 1883, and the appellant, the garnishee, assigns said order as error.

Section 182 of the code, after providing for the examination of garnishees in attachment proceedings before the court, or judge, or a referee, continues: "The court or judge may, after such examination, order personal property capable of manual delivery, to be delivered to the sheriff, on such terms as may be just, having reference to any liens thereon, or claims against the same, and a memorandum to be given of all other property containing the amount or description thereof."

It was not intended by this section of the code to establish an adversary proceeding in which the title to property in the hands of a garnishee, and claimed by him, might be disputed and litigated. The right of the court or judge in such a proceeding depends entirely upon the admissions of the garnishee.

If he admit the property in his hands to be the property of the defendant, free from claim on his part, the court may order the delivery of the property to the sheriff, to answer any judgment that may be recovered against the defendant. If he admit the property to be that of the defendant, coupled with a claim or lien against it in his favor, the court or judge may still order the property delivered to the sheriff on such terms as may be just, having reference to the claim or lien of the garnishee. The proceeding is one to probe the conscience of the garnishee, by an examination under oath, when his unsworn memorandum, provided for by section 183 of the code, proves unsatisfactory to the plaintiff, and in the nature of discovery in aid of the right of action against the garnishee given by section 181 of the code. This construction is reasonable, and it obviates grave constitutional questions which any other construction would require to be met.

From these views, it follows that the order of the judge in the proceeding below was in excess of his authority.

Upon the case as made, there was only one order that would have completely and certainly protected the rights of the garnishee. That was, to require her to turn the notes and contracts over to the sheriff upon being paid the sum for which she held the same as security.

The sewing machine contracts, as we understand them, are contracts by third persons to pay the defendants money at a future time. Extreme diligence is required in the collection and enforcement of demands such as these notes and contracts are, and, as the garnishee is not protected by bond, it would be unjust to require

her to stand idly by and rely for their collection upon the exertions of a third person.

As to some kinds of property, an order requiring the delivery of the same to the sheriff, and making proper provision for the satisfaction of the prior lien of the garnishee out of the money received from the sale of the same, would, doubtless, be just. As to property of the character of that in controversy, such an order is not just as that term is used in the statute.

The order of the court below is reversed, and the cause remanded for further proceedings.

GREENE, C. J., and HOYT, A. J., concurred.

E. C. MEACHEM ARMS COMPANY v. SWARTZ ET AL.

Filed July 24, 1885.

INJUNCTION—FRAUDULENT MORTGAGE—RIGHTS OF ATTACHING CREDITOR.—Under section 1,997 of the code the district court has jurisdiction to grant an injunction, enjoining the foreclosure of a fraudulent mortgage, at the instance of an attaching creditor of the mortgagor, who has not reduced his claim to judgment.

APPEAL from a judgment of the district court, entered in favor of the defendants. The opinion states the facts.

Foster & Houghton and *Binkley & Taylor*, for the appellants.

Nash & Kinnaird, *Wm. Murray* and *M. T. Harlson*, for the appellees.

WINGARD, A. J. The appellants brought an action in the district court, fourth district, against Emanuel L. Swartz, and an attachment was issued and levied upon his stock in trade at Spokane Falls, Spokane, Washington territory.

Swartz had previously executed and delivered to his wife, Elizabeth L., a chattel mortgage purporting to cover all his property, and said Elizabeth L. had commenced proceedings to foreclose said chattel mortgage, when the attachment was levied. The sheriff was in possession of the mortgaged property.

Appellants applied to the district court and obtained an injunction restraining the mortgagee, sheriff and all others from foreclosing said mortgage, and setting up that the mortgage was fraudulent and void, without consideration, for the use and benefit of the mortgagor, and that it was a scheme and contrivance entered into between Swartz and his wife to hinder, delay and defraud his creditors, that the property mortgaged was all the property owned by Swartz, and that if the same was sold upon foreclosure the appellants would be without remedy to collect their claim, and they prayed that the injunction be made perpetual and the mortgage be declared void and not a lien.

Separate answers were filed by the appellees, but both, either by express admission or a failure to deny, admit the making and at-

tempt to foreclose the mortgage, admit the attachment by plaintiffs, admit the debt due from Swartz to them, and that he had no other property subject to execution as set forth in the complaint.

Strong, Hackett & Co. consented to be made parties plaintiff, and it was so ordered by the court.

When the cause came on for hearing the appellants moved for judgment on the pleadings, which motion was overruled.

The appellees then moved to have the bill dismissed, whereupon the plaintiffs below asked leave to file a supplemental bill, alleging that since the filing of the original bill they had prosecuted their suit to final judgment.

This leave was denied by the district court.

The bill was then dismissed by the court, to which action of the court the appellants excepted.

It is contended by the appellees that the bill for injunction, etc., being a suit in equity, could not be maintained to set aside a fraudulent mortgage by an attaching creditor before judgment.

We think the appellants had a right to file the supplemental complaint which they asked leave to file, under section 114 of the code of this territory, and had this been done, the contention of the appellees in this regard would have been eliminated. Moreover, the jurisdiction of the district court to entertain the bill for injunction is expressly given by section 1,997 of the code: "Fraud is one of the primary subjects of equity jurisdiction." Equity does that which right and reason and good faith and good conscience demand in the case.

If the appellants in such a case as this should be obliged to await their judgment at law, the law would furnish no adequate remedy, reason would be disregarded and right annulled: Kalno v. Solomon, 20 Fed. Rep., 801; Rolent v. Hodges, 16 N. J., 299; Heyneman v. Donnenbury, 6 Cal., 376, 380; 33 Texas, 316; 55 U. S., 14 Howard, 314; Drake on Attachment, sec. 225; Bump on Fraudulent Conveyances, 524; Williams v. Michenor, 11 N. J., 520.

Let the judgment of the district court be reversed and the cause remanded for further proceedings.

GREENE, C. J., and HOYT, A. J., concurred.

WILT ET AL. *v.* BUCHTEL.

Filed August 4, 1885.

STATUTE OF LIMITATIONS—COMPLAINT.—Upon a review of the facts stated in the complaint, *held*, that the action was barred by the statute of limitations.

APPEAL from a judgment of the district court. The opinion states the facts.

Carroll, Ten Eyck & Root, for the plaintiffs in error.

Merrill & Heald, for the defendant in error.

WINGARD, A. J. This was a civil action or proceeding to enforce specific performance, under chapter 52 of the code.

The complaint or petition alleges that on or about April 13, 1869, L. P. Fuller and C. P. Ferry bound themselves, by an instrument in writing, to convey certain real estate in this territory to Joseph Buchtel, of which said real estate they were, at that time, owners in common.

The instrument which is made part of the complaint, is substantially as follows: "Know all men by these presents, that we, L. C. Fuller and C. P. Ferry, are held and firmly bound unto Joseph Buchtel of etc., in the full penal sum of four hundred dollars, for the payment of which we bind ourselves jointly and severally, our heirs, executors and administrators.

"The condition of this obligation, is such, that, whereas, the said Fuller and Ferry have sold unto the said Buchtel ten acres of land, at New Tacoma, in the county of Pierce, W. T., and, whereas, the said Buchtel has paid to paid Fuller and Ferry for said land one hundred dollars, and agrees to pay, as the purchase price thereof, the further sum of one hundred dollars, if, within five (5) years from the date of these presents a railroad company shall permanently locate a railroad, running through, or terminating at, said Tacoma, which sum shall become due and payable immediately upon such location:

"Now, therefore, if, upon the payment of said Buchtel of said one hundred dollars, in case of the permanent location of a railroad as aforesaid, within the time aforesaid, and as soon as such location is made, or upon such payment at any time prior to such location, or the expiration of said time, or in case there shall be no such location of a railroad as aforesaid, within said period, then on demand of said Buchtel, without further payment, the said Fuller and Ferry shall make and cause to be made, executed and delivered to said Buchtel, his heirs, executors, administrators and assigns, a good and sufficient conveyance of said lot of land near Tacoma aforesaid, in fee simple, free from incumbrances, and with the usual convenants of warranty, then this obligation to be void, otherwise, to be and remain in full force and virtue, in law and equity."

The complaint further alleges that said Buchtel has performed all the conditions required by him; that he paid to said Ferry the further sum of one hundred dollars, on or about August 7, 1877.

That after making said instrument, and before making a conveyance, the said Fuller removed from Washington territory, and died in the state of Virginia.

That on the ninth day of August, 1877, in accordance with the terms of the instrument aforesaid, the said Ferry made a deed of all his interest to said Buchtel, but that the said Fuller, his heirs, executors or administrators have not made, or caused to be made, any deed as required to said Buchtel.

The plaintiffs in error demurred to this complaint generally and specifically.

The court overruled the demurrer, and the judgment overruling the demurrer is assigned as error.

It is patent, upon this complaint, that the action is barred by the statute of limitations.

The bond or instrument was executed April 13, 1869. No demand is alleged to have been made. The second one hundred dollars was paid August 7, 1877, and suit was not commenced until April 18, 1884.

Let the judgment of the court below be reversed, and the cause remanded for further proceedings.

GREENE, C. J., and TURNER, A. J., concurred.

LEONARD *v.* TERRITORY.

Filed August 4, 1885.

MURDER—INDICTMENT—DELIBERATE AND PREMEDITATED MALICE.—Under section 786 of the code, an indictment for murder in the first degree must allege, in direct language, that the killing was done purposely and of deliberate and premeditated malice. An inferential averment of such facts is not sufficient.

THE SAME—DEFENDANT SERVED WITH INDICTMENT—RECORD.—In a prosecution for murder, the record need not show that the defendant was served with a copy of the indictment before trial.

THE SAME—FORM OF OATH.—An oath administered to a trial jury, in a prosecution for murder or manslaughter, "to well and truly try and true deliverance make between the territory and the prisoner at the bar, whom they shall have in charge, according to the law and the evidence as given them on the trial," is a sufficient compliance with section 1,084 of the code.

PAROL EVIDENCE OF THE CONTENTS OF A LETTER IS INADMISSIBLE, unless a sufficient foundation has been laid therefor.

THE ADMISSION IN EVIDENCE OF A MAP, intended to exhibit and illustrate the vicinity of a supposed homicide, in a prosecution therefor, is within the discretion of the court.

EVIDENCE TO IDENTIFY THIRD PERSON WITH KILLING.—Where the evidence tending to connect the defendant with the killing is entirely circumstantial, he is entitled to offer evidence of the same nature tending to identify some other person as the guilty party.

REASONABLE DOUBT, WHAT IS.—A reasonable doubt for a trial juror is such a doubt as a man of ordinary prudence, sensibility and decision, in determining an issue of like concern to himself, as that before the jury, would allow to have any influence whatever upon him, or make him pause or hesitate in arriving at his determination. The instructions as to what constitutes reasonable doubt reviewed, and held erroneous.

FAILURE OF DEFENDANT TO DISPROVE CIRCUMSTANCES—INSTRUCTIONS.—An instruction "that the fact that defendant does not disprove circumstances proved before them will give additional weight to such circumstances as are proved, if the jury believe the defendant has the means of disproving them if they be false," is erroneous, because it assumes that circumstances have been proved, and because the jury might infer that the failure on the part of the defendant himself to testify would operate against him.

AN INSTRUCTION AS TO WHAT CONSTITUTES MURDER IS ERRONEOUS if it omits all reference to justifiable or excusable homicide; or does not make malice necessary to murder in either degree; or does not charge that, in order to constitute murder in the first degree, the malice, and not merely the killing, must be deliberate and premeditated.

ERROR to the second district court. The opinion states the facts.

W. Scott Beebe, for the plaintiff in error.

N. S. Porter, for the defendant in error.

GREENE, C. J. The plaintiff in error prosecutes this suit to reverse a judgment of death against him, and to procure a new trial.

He was indicted in November, 1882, as is supposed, for murder in the first degree, and was convicted and sentenced in May, 1884.

Errors in great number and variety are assumed to have occurred in the lower court, some before, some during, and some subsequent to the trial, any of which, it is claimed, would be sufficient to vitiate the judgment, and all of which, except what otherwise appear of record, are duly saved in a bill of exceptions. We will pass upon the most important of these supposed errors in their order.

A fatal defect, first of all, is alleged to exist in the indictment itself. Guilt of murder in the first or second degree cannot, it is contended, be gathered from the facts set forth as constituting the crime.

"Every person," says our statute, "who shall purposely and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be administered, kill another, every such person shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death;" and "every person who shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree:" Code, sections 786, 790.

Such is the statute of murder under which the plaintiff in error was put to his trial, upon an indictment, the body whereof reads as follows: "Andrew Leonard is accused by the grand jury of the territory of Washington, composed of good and lawful men from the body of the second judicial district, and from the counties of Cowlitz and Wahkiakum, duly elected, empaneled, sworn and charged to inquire of and true presentment make to the said district court at the regular November term, A. D. 1882, of the said district court, begun and held at Kalama in the county of Cowlitz in the district aforesaid, on the fourth Monday, being the twenty-seventh day of November, A. D. 1882, of all offenses committed in the said district, against the laws of the territory of Washington, by this indictment of the crime of murder in the first degree, committed as follows, to wit: The said Andrew Leonard on the fifth day of November, A. D. 1882, and within one year next preceding the date hereof, in the county of Cowlitz aforesaid, in the said district, in said territory of Washington, in and upon one Ambrose Patton, feloniously, purposely, and of deliberate and premeditated malice, did make an assault, and that the said Andrew Leonard, with a certain gun, then and there loaded and charged with gun powder and leaden bullets, then and there feloniously, purposely and of deliberate and premeditated malice, did discharge and shoot off to, against, and upon the said Ambrose Patton, and that the said Andrew Leonard, with the leaden bullets aforesaid, out of the gun aforesaid, then and there by force of the gun powder aforesaid by the said Andrew Leonard discharged and shot off as aforesaid,

the said Ambrose Patton, in and upon the left side of him, the said Ambrose Patton, then and there feloniously, purposely and of deliberate and premeditated malice, did strike, penetrate, and wound, giving to the said Ambrose Patton, then and there with the leaden bullets aforesaid, so as aforsaid shot and discharged and sent forth out of the gun aforesaid by the said Andrew Leonard, in and upon the left side and head of him, the said Ambrose Patton, eleven mortal wounds of which said mortal wounds the said Ambrose Patton then and there instantly died.

"And so the jurors aforesaid do say that the said Andrew Leonard, the said Ambrose Patton in manner and form aforesaid, then and there feloniously, purposely and of deliberate and premeditated malice, by means of said gun and the shooting aforesaid, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the territory of Washington. Dated at Kalama, in the district aforesaid, this twenty-ninth day of November, A. D. 1882."

Our statute requires, that to constitute such a murder in the first degree as would consist with the facts charged in this indictment, the killing must have been done purposely, and of deliberate and premeditated malice. Five or six states have statutes similar to, and three or four others statutes almost or quite identical with our own. So far as we are advised, the supreme courts of all those states concur in holding, that to bring a case within the statute, the indictment must charge that the killing itself was purposed, deliberate, premeditated and malicious: Or. Cr. Codes, sec. 506; 7 Or., 198; 8 Ohio St., 109, 307; 10 Ohio St., 459; 54 Ind., 135; 59 Ind., 105; Iowa code, sec. 4,192; 4 Greene, 500; 27 Iowa, 402; 24 Penn. St., 286; 83 Penn. St. 131; 5 Mo. 379; 20 Mo., 58; 25 Mo., 326; 66 Mo., 24; 8 Yerger, 534; 49 N. H., 369.

It is clear that the indictment ought to charge the crime conformably to the definition of the statute. Nowhere does the one before us so charge murder, in either degree, unless its closing paragraph beginning "and so," can be taken to eke out what is alleged in the preceding sentence. In the former part, or body of the indictment, both purpose and malice are ascribed to the assault, and to the shooting and wounding, but neither of them to the killing or giving of the mortal wounds. Since this is so, we conclude that if purpose or malice in the very killing itself is anywhere averred, it must be in the closing paragraph.

Does that paragraph aver either? Evidently it does, if the positive allegation contained therein, "that the said Andrew Leonard, the said Ambrose Patton in manner and form aforesaid, then and there feloniously, purposely and of deliberate and premeditated malice, by means of said gun, and the shooting aforesaid, did kill and murder," introduced, as the allegation is, by the words "and so," can be held to be such an averment, and otherwise it manifestly does not.

A meaning, other than that which the grand jury may fairly be said to have intended it should bear, cannot be given it. The incriminating facts, upon which they intended the defendant should be tried, they have undertaken to express in words. How they say what they do say, is the best and only possible evidence of what they intended to say. By the words they have used, and the structure they have given to the sentences into which they have framed their words, we shall ascertain the meaning they have intended.

Under our laws an indictment must be direct and certain, both as regards the crime charged and as regards the particular circumstances thereof, when they are necessary to constitute a complete crime. The circumstances of purpose and malice, as ingredients of the killing, are necessary to constitute the complete crime of murder, in either degree, by our law. Therefore, if the words, "and so," preceding the averment of purposeful and malicious killing, indicate an intent on the part of the grand jury to announce a mere inference that they draw from facts they have previously set forth, then the charge that the defendant "purposely, and of deliberate and premeditated malice," killed, positive though it be, should not have the force of a direct and certain averment.

How can it be sensibly claimed that an inferential statement should have the force of an absolute? Everybody recognizes and allows for the difference. Give to the one statement the same effect as to the other, and you break down and do away with those necessary partitions, those ancient landmarks, between meaning and meaning, which must reverently be preserved and heeded, if communication between mind and mind is to be either possible or safe. It is true, that our statute, prescribing criminal procedure, quite abolishes the embarrassing and injurious technicalities of the common law, but it also declares, in the interest both of the public and of the party accused, that the act or omission charged as crime shall be "clearly and distinctly set forth, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." From the statutory provisions, we gather that our courts, and defendants in the courts, are to view indictments through the simple atmosphere of common sense, and not through the line-multiplying spectroscope of the common law; but we do not understand that, in construing indictments, forms of expression are to be utterly disregarded, and that things are to be understood, as intended to be expressed, for which there appears no adequate or sensible form of expression. That a defendant must be tried for something definitely charged, or he has no fair trial, is very clear. Our statute designs and insures a fair trial, and is in perfect harmony and furtherance of all constitutional provisions in that regard.

From an application of these considerations to the form of expression adopted by the grand jury as the closing paragraph of their indictment in this case, it follows that if the language of the paragraph is such as would naturally be understood to state an inference,

then neither the defendant nor the court, nor any person of common understanding could have learned from the indictment that the grand jury found anything more than the fact of manslaughter and a conclusion of murder; for, assuming the paragraph to be purely inferential, they say, in effect, "we find it to be true, as matter of fact, that the defendant committed manslaughter, and we find it to be sound, as a conclusion therefrom, that he committed murder in the first degree." Grant such to be the meaning of this indictment, then, the utmost issues, upon which the defendant could be tried or his cause heard under it, would be: 1st. Is it true, as matter of fact, that he committed manslaughter; and, 2nd. Is it sound, as a conclusion therefrom, that he committed murder? Of course, the former is an issue of fact, the latter one of law; and if these issues comprise all that arise under the indictment before us, the defendant could not be put upon his trial before a jury for any higher grade of offense than manslaughter.

Dictionaries furnish us with no definition of the word "so" that will fit the connection of this paragraph except the word "therefore," or other words expressive of the idea of logical sequence. In a common law indictment for murder, a closing paragraph like this was regularly added after the charging part of the bill as "a conclusion of law:" 1 Chitty Cr. Law, 231; 3 id., 737; Rex v. Nicholas *et al.*, 32 Eng. C. L., 620; 1 Russ. Cr., 563.

Such a legal conclusion, the grand jury who produced this indictment, certainly could have expressed if they had so desired; and if having so expressed themselves, we refuse to recognize their intention, we virtually take from them the power of expression. Easily they could have passed into the well-worn track of centuries of grand juries who had gone before them. Then, if they appear to have done this, why should we not understand that they have done it? Every "person of common understanding" must, upon reflection, it seems to us, perceive that they have.

Reaching this conclusion, we find ourselves well supported by authority. No abler judges have graced the supreme bench of Iowa than Judges Greene and Dillon. A decision is reported of each of them on the precise point of the insufficiency of an indictment like this to sustain a conviction of murder: Fouts v. State, 4 Greene, 500; State v. McCormick, 27 Iowa, 402. Likewise, has decided the supreme court of Ohio in two well-considered opinions: Fouts v. State, 8 Ohio St., 109; Kain v. State, Ib., 306.

Leaving now the indictment, we pass to another supposed error. It appears that the record fails to show that the defendant was served with a copy of the indictment twenty-four hours before trial. For such service provision is made by statute, but we do not think that the record need show the service: Lytle v. Terry, 1 Wash., 435.

Exception could have been taken by defendant to the action of the court below, if it forced him to trial contrary to the statute.

There is no claim that he did not seasonably get his copy of the indictment, but only that the record does not show he did.

Hardships, if there were any, could have been relieved upon exception.

Referring to the next supposed error, we find it relates to the oath administered to the trial jury. Objection is made that the oath administered was fatally variant from that prescribed by statute.

Under the statute, a jury in a capital case must be sworn to "well and truly try and true deliverance make between the territory and the prisoner at the bar, whom they shall have in charge, according to the evidence:" Code of 1881, sec. 1,084.

Going into this case, the jury were sworn to "well and truly try and true deliverance make between the territory and the prisoner at the bar, whom they shall have in charge, according to the law and the evidence as given them on the trial." How this oath can be held bad we do not see, unles the words "as given them on the trial" are to be regarded as qualifying the word "evidence" only. Judged by the ordinary rules of speech, it should be understood to qualify the whole phrase, "the law and the evidence." Evidently, it would be error to give the jury to understand, under the solemn form of an oath, that on them rested the responsibility of having the defendant tried according to law. Such, however, was not the sense of the oath they took. Under it, they were bound to no other obligation than would have been theirs under the simpler statutory formula. Substantially, their oath corresponded to that which the court upheld in the case of Hartigan v. Territory, 1 Wash., 447, and which followed the statute, save that it added the supplementary words "and the law as given by the court." Cases cited by counsel, none of them, conflict with that decision.

Holding as we do, respecting the indictment, the divergence of the oath under consideration from that prescribed for capital cases becomes immaterial, except as the latter, because prescribed for such cases, naturally and practically becomes the oath under which are tried all sorts of cases of included crimes.

Regarding this indictment, however, as one for manslaughter simply, for the trial of which crime, when not included in a charge of murder in the first degree, the statute prescribes that the jury shall be sworn to "well and truly try the issue between the territory and the defendant according to the evidence:" Code, sec. 1,084; we think the oath actually administered nevertheless good. It contains nothing but what the legislature have approved as a fitting oath for the trial of manslaughter when included in the capital charge, together with the addition already discussed. Still, we think, correct practice requires close adherence to the statutory formulas in the administration of trial oaths, and we would not be understood to countenance any looseness in that respect. The legislature presumably had some sound reason in prescribing one form of oath for capital and another for all other cases.

On the trial, a witness, George Roberts, was permitted to state the contents of a letter signed "J. Jackson," and the permission has been assigned as error. Under the circumstances we are of

opinion that it was error. Really, so far as the transcript shows, no sufficient foundation had been laid for proof by parol. Letting that be as it may, there was, apart from the contents of the letter, no evidence to connect it with the defendant, and there was nothing in the contents themselves, in the light of the other evidence, that would point to defendant as the writer.

Offer was made by defendant, in course of the trial, to introduce in evidence a map marked "exhibit A," and intended to exhibit and illustrate the vicinity of the supposed homicide.

Refusal by the court to admit the map is one of the errors assigned.

Discretion was vested in the court, we think, to admit or reject a map under the circumstances, in evidence. But this particular map was loaded with explanatory matter in the nature of hearsay, and should properly have been excluded under any circumstances.

We find no error in the refusal complained of.

In excluding certain proffered testimony of James Galloway, a witness for defense, it is claimed there was error. By him defendant proposed to prove that a person other than himself resided in the neighborhood of the supposed homicide, was there on the day of it, entertained hostile feelings towards the deceased, and had threatened to kill him. In view of the evidence for the prosecution, we think this testimony should have been admitted. One main question on the trial was, who killed the deceased? Addressed to this, the evidence for the prosecution was wholly circumstantial, and some of it, tending to identify the defendant as the slayer, was of a like description to that proposed to be obtained from this witness. Defendant, therefore, had a right to meet and neutralize or overcome the evidence of the prosecution, tending to identify himself as the guilty party, by evidence of the same nature tending to identify some other person as the perpetrator of the crime: 10 Texas App., 246; 30 La. Ann., pt. 2, 921; 31 Ib., 368; 32 Gratton, 912; 70 Mo., 594; 71 Ib., 312; 36 Am. Rep., 293.

Among the instructions given for the prosecution was this:

"The rule requiring the jury to be satisfied of the defendant's guilt, beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied, beyond a reasonable doubt, of *each link* in the chain of circumstances *relied upon* to establish the defendant's guilt. It is sufficient if, taking the testimony altogether, the jury are satisfied beyond a reasonable doubt that the defendant is guilty."

The giving of this instruction, we think, is well assigned as error. The metaphor of the "chain," taken in connection with the remainder of the instruction and the evidence, seems to us inaccurate and misleading. Probably what the judge meant to say was, that the jury did not need to be satisfied, beyond reasonable doubt, of every inculpatory fact. Ordinarily, in a case resting in circumstances, a linked arrangement of fact to fact is observable in a part or parts of the evidence. But a guilty person is more commonly hemmed in by a throng of circumstances than inclosed by facts arranged chain-

wise. Release from a chain comes when the weakest link gives way; but escape from a crowd does not necessarily depend on the presence or absence of one or another, or even, perhaps, the greatest number, of the individuals composing it. In this case, the inculpatory facts were grouped about the prisoner, and only a part of them were linked together, or strictly interdependent. The fault in the instruction lies in its tendency to lead the jury to regard all the facts as disposed in a chain, every link in which, if such were the case, would need to be proved beyond a reasonable doubt.

Two other instructions for the prosecution, the giving of each of which is assigned as error, are as follows:

1. "The jury are instructed that the reasonable doubt which entitles an accused to acquittal is a doubt of guilt arising from all the evidence in the case. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act without hesitation in their most important affairs. By a reasonable doubt is meant an actual, substantial doubt, not a doubt from mere caprice or groundless conjecture."

2. "That while it is necessary for the prosecution to prove every material allegation in the indictment, beyond a reasonable doubt, yet, if the proof is of the nature that it would control and decide the conduct of reasonable and cautious men in the highest and most important affairs of life, then, as a matter of law, facts established by such evidence are deemed to be established beyond a reasonable doubt, and the jury, with that kind and degree of proof before them as to every material allegation, should convict."

Both of these instructions seem to us erroneous. The former is good, if tested by the definition of reasonable doubt given by most of the law-writers and courts. Still, it seems to us open to criticism. The latter does not discriminate between considerations, which would ultimately decide and control the conduct of reasonable and cautious men, and suggestions which would receive a certain amount of attention and deliberation, though eventually to be rejected. Pertinently to both instructions, we would remark, that the most important affairs of ordinary prudent men, or affairs that are deemed such, are often mere matters of business or pleasure, or some small risk to life or limb. Whether a doubt is reasonable or not, is never an absolute, but always a relative question. It can only be answerd by reference to the circumstances and the issues to which it is related. What would not be a reasonable doubt in a matter of slight consequence, and, in one situation, would be a reasonable one in another posture of affairs, and in a matter more momentous. A sensible and humane man will proceed more cautiously when life or death turns on which steps he takes, than, if the result involved, is the payment of some small fine. "Skin for skin; all that a man hath will he give for his life."

A doubt is reasonable, if in view of all the surroundings and the issue to be decided, it would not be unreasonable to entertain it,—

which is much the same as to say, that a reasonable doubt is one that is reasonable. A reasonable doubt for a trial juror, is such a doubt as a man of ordinary prudence, sensibility and decision, in determining an issue of like concern to himself, as that before the jury to the defendant, would allow to have any influence whatever upon him, or make him pause or hesitate in arriving at his determination.

In the last instruction for the prosecution, the court tells the jury: "That the fact that defendant does not disprove circumstances proved before them will give additional weight to such circumstances as are proved, if the jury believe the defendant has the means of disproving them if they be false."

This also is objected to as erroneous, and we deem the objection sound. It is assumed, by this language, that circumstances have been proved, whereas, it is for the jury to say whether any have been proved or not. Moreover, by it, the jury are charged that the failure to disprove, will give additional weight to circumstances proved, whereas, in truth, the failure does not necessarily add weight to anything, but only brings into the case an additional circumstance, of greater or less significance, namely, the failure itself, which circumstance is to be received by the jury for whatever, on the whole it is worth, and may, or may not, combine with the other circumstances in the case, adding its weight to theirs, so that they, with it, will weigh more than they would alone.

As to any failure on the part of defendant himself to testify, we doubt whether the instruction is sufficiently qualified, to the apprehension of the jury, by another correct instruction, afterwards given, to the effect that the jury should draw no inference of guilt against the defendant from his failure to testify in his own behalf.

The code provides "that it shall be the duty of the court to instruct the jury that no inference of guilt *shall arise* against the accused if the accused shall *fail* or *refuse* to testify as a witness in his or her own behalf:" Code of 1881, sec. 1,067.

We think that the spirit of this provision demands, that the failure of the defendant to testify as to any point shall not operate to his disadvantage in any branch or aspect of the case.

The next and last supposed error, that deserves particular notice, is the giving of the following instruction:

"If you find the facts necessary to establish the guilt of defendant, proven to the certainty above stated, then you may find him guilty of such a degree of crime as the facts so found show him to have committed; but, if you do not find such facts so proven, then you must acquit. The facts which you must find to be established to the degree above stated, are: That Ambrose Patton, named in the indictment, is dead; that he came to his death by reason of a gunshot wound or wounds, and that said wound or wounds were purposely inflicted by the defendant. These facts being so proven, the defendant should be convicted of manslaughter; and if you find, in addition to these facts, the further fact, that the said wound or

wounds were so inflicted with an intent to kill the deceased, then you may convict defendant of murder in the second degree; and if you further find the additional fact, that such intention to kill was deliberated upon and premeditated by the defendant, then you may find him guilty of murder in the first degree, as charged in the indictment. In determining the question of intention, you have a right to assume that the defendant intended the usual and probable effect of the acts which you find that he has committed."

It is very observable that this instruction does not leave the jury at liberty to find that the homicide, if committed, was justifiable or excusable; nor does it make malice necessary to murder in either degree; nor does it inform the jury that in order to constitute murder in the first degree, the malice, and not merely the killing, must be deliberate and premeditated; nor does it take account of the infirmity of the indictment, which falls short of charging more than manslaughter. In these respects, the instruction does not correspond with the law.

Many other supposed errors are assigned, but all of them that we consider well assigned, and of importance, can be disposed of by application of the same principles already enunciated. Nothing, therefore, remains for us to say, bearing upon the decision of this cause. But, in view of the verbiage characterizing the form of indictment before us, we think it not out of place for us, in closing this opinion, to recommend as more conformable to our statute, a form suitable, *mutatis mutandis*, for use by the grand juries and prosecuting officers of this territory, as follows:

"District court for the second judicial district of Washington territory, holding terms at Kalama.

"THE TERRITORY OF WASHINGTON
"vs.
"ANDREW J. LEONARD.

"Andrew J. Leonard is accused by the grand jury of the territory of Washington for the counties of Cowlitz and Wahkiakum, by this indictment, of the crime of murder in the first degree, committed as follows: He, said Andrew J. Leonard, in said county of Cowlitz, on the fifth day of November, 1882, purposely and of his deliberate and premeditated malice, killed Ambrose Patton, by then and there purposely, and of his deliberate and premeditated malice, shooting and mortally wounding the said Ambrose Patton, with a gun, which he, the said Andrew J. Leonard then and there held in his hands.

"Dated at Kalama in the district aforesaid, the twenty-ninth day of November, 1882. N. H. BLOOMFIELD,
"Prosecuting Attorney."

The judgment of the district court will be reversed and a new trial granted.

WINGARD, A. J. I concur in all the foregoing opinion except the reasoning and conclusion in regard to the sufficiency of the indict-

ment. See dissenting opinions of Justices Swan and Brinkerhoff in Fouts v. The State, 8 Ohio State, 109.

TURNER, A. J. In concurring in this opinion, I desire to dissent from the reasoning of the court as to the thirteenth instruction. I agree that that instruction is error, but I think it is error because it directs the jury to consider the failure of the accused to offer evidence in his defense for the purpose of assisting them to remove a reasonable doubt of his guilt, when, under the law, he is, in no case, required to offer evidence until his guilt is established beyond a reasonable doubt.

In other words, I do not think the failure of an accused person to offer evidence, can, in any case, be considered by the jury as a circumstance to determine, or to assist in determining, his guilt.

PUGET SOUND IRON COMPANY *v.* WORTHINGTON BROS.

Filed August 4, 1885.

PLEADING—DENIAL OF CONTRACT SUED ON.—Where the contract, for the breach of which an action is brought, is set out in the complaint, an issue is raised by the defendant's denying such contract. He need not affirmatively allege the contract as he understands it.

THE ERRONEOUS ADMISSION OF EVIDENCE IS NOT GROUND FOR REVERSAL, if the court instructs the jury to disregard it.

A CONTRACT FOR THE MANUFACTURE OF CHARCOAL is not a contract of sale, and need not be in writing.

APPEAL from the district court. The opinion states the facts.

J. R. Lewis and *O. Jacobs*, for the appellants.

Burke & Haller, for the appellees.

TURNER, A. J. The action in the court below was brought by the appellees against the appellant for the breach of a contract described as follows:

"Said defendant entered into a contract with plaintiffs, by the terms of which it was, among other things, mutually agreed, to the effect that said defendant should cut, cord and furnish to plaintiffs, within a reasonable time thereafter, all the cord wood on the lands known as the Bishop and Johnson land, situate at Irondale, Jefferson county, aforesaid, for the purpose of the whole thereof being made and converted into good and merchantable charcoal by plaintiffs; and said defendant further agreed to pay plaintiffs eight cents for each and every bushel of said charcoal delivered by plaintiffs to defendant, and to charge plaintiffs for said wood, at the rate of one dollar for every forty bushels of charcoal delivered as aforesaid and no more."

The complaint alleges performance upon the part of plaintiffs with all the conditions of the contract, and alleges as a breach by the defendant the refusal to deliver the balance of the wood described in the contract, some four thousand cords, to be made into charcoal by the plaintiffs.

The defendant, in its answer, denies all the material allegations of the complaint. For an affirmative defense it sets out *in haec verba* a written contract entered into between the plaintiffs and itself on the day alleged in the complaint as the day on which the contract sued on was made, whereby it was to deliver to the plaintiffs to be made up into charcoal, ten thousand cords of wood more or less; alleges that no other contract than the contract thus set out was ever entered into between plaintiffs and itself, and alleges that it has fully performed the conditions of said contract by delivering to the plaintiffs some thirteen thousand cords of wood.

The plaintiffs replied to the answer as follows: "That at the time of the making of said written agreement and thereafter, it was mutually agreed by and between plaintiffs and defendants in addition to said writing, and as part of the contract sued on in this action, that defendant should furnish plaintiffs, within a resonable time, and plaintiffs should manufacture into charcoal and deliver at the price named in the said writing, all the cord wood then cut and corded, or standing, or lying, or being upon all the lands known as the Bishop and Johnson lands situated at Irondale aforesaid."

The defendants demurred to this reply, which demurrer was overruled. The parties then went to trial, and the trial resulted in a verdict for plaintiffs. The cause is here by appeal under the act of 1883.

The first matter assigned by the appellant in error which we shall notice is the failure of the court to sustain the demurrer to the reply. The appellant attacks the reply as a departure in pleading. The appellees attempt to sustain it as new assignment of the contract described in the complaint. In our judgment it is neither. It is not a departure, because it is perfectly consistent with the complaint. It is not a new assignment, because there is no such thing as a new assignment, as that term was understood at common law, under our system of pleading. If, under our system, it becomes necessary for a party to restate his cause of action, he may do so by amendment. The reply must traverse or confess and avoid: Code, section 86.

But the reply was, for the purposes of the action, wholly impertinent. It should have been striken from the cause. It was no more impertinent, however, than the affirmative defense which it professed to reply to. Under our system of pleading, the technical learning of the common law pleader is of but little account. The plaintiff is required to state his cause of action with sufficient particularity to apprise the defendant of its true character. The defendant, in his answer, must deny the facts alleged in the complaint, or he must state new matter in avoidance or by way of counter claim. If these several pleadings are not accurate and full, the party required to take the next step may have them made more definite and certain before he proceeds. With these fundamental principles kept in view, it would seem easy for a person of ordinary intelligence to frame correct pleadings.

In this case, the defendant denied all the matters averred in the complaint. His affirmative defense cannot be construed as doing more; neither the supposed affirmative defense nor the reply to it added anything to the issue, which was fully and completely made up when the defendant denied that it made the contract described in the complaint.

It added nothing to that denial to set out affirmatively the version of the contract which defendant insisted was the true one. Seeking no affirmative relief, it made no difference what other contract it had made with plaintiff, if it had not made the one sued on.

It is a matter of surprise to the court, that counsel of so much ability and industry as those engaged in this cause, should have overlooked these plain and obvious principles of code pleading.

The court properly overruled the demurrer to the reply.

The record shows that the defendant, before demurring, moved to strike out the reply, but upon what ground is not shown.

No exception was reserved to the action of the court overruling that motion. In any event, we should not consider the error as sufficient to justify a reversal. The defendant was not prejudiced by the reply except in the matter of additional costs, and it had set the example of making useless costs by filing an answer stuffed with impertinent averments.

The next matter, assigned as error, is the action of the court in permitting the plaintiffs to introduce in evidence negotiations, propositions, talks and bargainings, had between the parties, prior to the making of the written contract.

Without deciding whether the facts received in evidence are accurately described in the assignment, or whether such as they were, the court erred in receiving them, it is sufficient to say that the court, in its charge to the jury, withdrew all such facts from their consideration. This cured the error in receiving the facts, if there was any error.

The next and last assignment of error, insisted on, is that the court permitted the plaintiffs to show a verbal contract made after the making of the written contract, whereby the number of cords of wood to be delivered the plaintiffs, to be made into charcoal, was increased from the number fixed by the written contract, to all the wood on the Bishop and Johnson lands.

It is insisted by the appellants that the contract being for the sale of goods, wares and merchandise of the value of fifty dollars, or more, the same is required to be in writing, and that the terms cannot be altered or added to by parol. The contract in this case was for the delivery by the defendant to plaintiffs of a certain quantity of wood which was to be manufactured into charcoal by plaintiffs, and then delivered to the defendant. In the settlement between the parties the defendant was to be allowed for the wood at the rate of one dollar per cord, and the plaintiffs were to be allowed for the charcoal at the rate of eight cents per bushel. The defendant agreed, in the written contract, to pass credits from plaintiffs "on their

books for all labor performed in their coal contract, and when the contract is completed to pay them, their hands, and coal-haulers, the full amount due them." The defendant was to furnish all coal beds, said beds to be returned to them on the completion of the contract. By a further provision, "all cooking utensils and supplies, and all tools and property of every description used in the performance of this contract, received from this company (the defendant) and remaining unpaid for, shall not be subject to sale or other disposition by said parties of the second part," etc.

It seems plain, from this description of the contract, that it was not a contract of sale, and hence that it was not within the statute of frauds: Goodred v. Binney, 115 Mass., 450; Hight v. Repley, 19 Me., 137; O'Neil v. New York Mining Co., 3 Nev., 141; 3 Wait's Actions and Defenses, 514; 7 Wait's Actions and Defenses, 49.

The contract, not being one required to be in writing, it might be altered by parol, and the written contract and the verbal alterations stand as one contract: Bishop on Contracts, secs. 643, 645, 647; 7 Wait's Actions and Defenses, 377.

The verbal contract proven in the court below conforms to the contract averred in the complaint, and there was no error in receiving the same.

The judgment of the court below is affirmed.

HOYT, A. J., and WINGARD, A. J., concurred.

WINGARD v. JAMESON ET AL.

Filed August 4, 1885.

INJUNCTION—RESTRAINING EXECUTION OF JUDGMENT.—An injunction will not lie to restrain the execution of a judgment when it appears from the complaint that the object of the injunction suit is to litigate the same subject matter that was determined in the action in which the judgment was obtained.

APPEAL from a judgment of the district court, entered in favor of the defendants. The opinion states the facts.

P. P. Carroll, for the appellant.

Struve, Haines & McMicken, for the appellees.

GREENE, C. J. Appellant filed his complaint in the district court to enjoin the execution of a judgment recovered against him by the appellee Jameson, and her husband, now deceased. A general demurrer was interposed by the appellees as defendants.

The demurrer was sustained and judgment thereupon duly rendered against the plaintiff.

From the complaint we find that the appellee Claughton is the sheriff holding the execution on the original judgment, and that in the original suit the very same subject matter was litigated that is now sought to be litigated in this, but we do not find any facts set up which would justify a court of equity in vacating the result of

the former suit, and re-opening any of its issues. A demurrer to such a complaint ought to be sustained: 1 High on Inj., 2d ed., secs. 114, 165 and 166 and notes; Marine Ins. Co. v. Hodgson, 7 Cr., 332; Hendrickson v. Hinckley, 17 How. U. S., 443.

The judgment below is affirmed.

WINGARD, A. J., and TURNER, A. J., concurred.

SPARKS ET AL. *v.* BROWN ET AL.

Filed August 4, 1885.

CONTEST BEFORE LAND DEPARTMENT—CONCLUSIVENESS OF FINDINGS—FRAUD.—The findings of the secretary of the interior, on questions of fact involved in a contest before the land department, cannot be collaterally attacked except for fraud or mistake.

APPEAL from a judgment of the district court, entered in favor of the defendants. The opinion states the facts.

Williams, Durham & Thompson, for the appellants.

Rufus Mallory and *B. F. Dennison*, for the appellees.

GREENE, C. J. The main decisive question, we think, in determining whether the district court erred in sustaining appellees' demurrer, is one as to the power of a court of equity to review a finding of fact made by a competent tribunal. We consider the doctrine to be well established that such a review cannot be had, unless the finding is impeached for fraud or mistake: Hosmer v. Wallace, 47 Cal., 461; Wilcox v. Jackson, 13 Pet., 469; Shipley v. Cowan, 91 U. S., 330; Moore v. Robbins, 96 U. S., 531; Quimby v. Conlan, 104 U. S., 420; Steel v. Smelting Co., 106 U. S., 450. Whether there was a selection of land for military purposes under section 9 of the donation act, and whether any part of the Bolen donation claim was within one mile of such a tract so selected, are mixed questions of law and fact: River Bridge Co. v. Kansas P. R'y Co., 2 Otto, 318. The secretary of the interior had undoubted jurisdiction to determine them. No fraud or other cause of impeaching his findings appears in the bill of complaint. True, the bill, as originally framed, contained several allegations of fraud, which were stricken out on motion. But the fraud, so endeavored to be charged, if it ever existed, presumably supervened prior to the contest in the land department, and was available in appellants' interest before the secretary. Langford's fraud, if any, was in 1863; Halstein's in 1865; that of Brown and husband of the same dates; and no fraud has been well laid as against Hidden. All the appellees are alleged to have been parties to the contest. The allegations of fraud, therefore, were properly stricken from the pleading; for the secretary must be deemed to have found no fraud. He had before him for adjudication the very subject matter here proposed to be litigated, namely, the validity of Bolen's donation entry, and his decision as to every

question of fact involved could not be modified or reversed by any other tribunal in a collateral suit or proceeding save for fraud or mistake inherent in itself. See opinion in Wingard v. Jameson, *ante*, p. 483, decided at this term, and cases therein cited.

The judgment of the court below is affirmed.

WINGARD, A. J., and TURNER, A. J., concurred.

No. 406.

KENYON v. KNIPE ET AL.

Filed August 5, 1885.

DEFECTIVE ACKNOWLEDGMENT OF DEED CURED BY LEGISLATION.—The defect, if any, in the acknowledgment of a certain deed, *held* to have been cured by the act of the legislature, of November 10, 1873.

APPEAL from a judgment of the district court, entered in favor of the defendant. The opinion states the facts.

A. L. Palmer, and *G. L. Thorn*, for the appellant.

Burke & Haller, and *C. H. Hanford*, for the appellees.

TURNER, A. J. This action was brought by the appellant in the court below to abate an alleged nuisance erected and maintained by the appellees on the frontage to property of the appellant, known as lots six and seven, in block "B," in A. A. Denny's addition to Seattle, which property abuts on the waters of Elliott's Bay, an arm of the sea. Said lots six and seven abut on and extend below the line of high tide, and the wharf and other structures alleged to be a nuisance, are erected between the line of low tide and deep water, directly in front of said lots six and seven.

The appellees denied the material allegations of the complaint, and pleaded several affirmative defenses, and to the affirmative defenses the appellant replied.

After hearing, the judgment of the court below was for the appellees; and the cause is brought to this court by appeal.

Upon the trial below, the appellant offered in evidence to prove his title to the property in dispute, a deed from A. A. Denny and wife, executed in 1867. Objection was made to the introduction of this deed in evidence, because the acknowledgment of the deed made before the auditor of King county, was not authenticated by the official seal of that officer. The court sustained the objection, and the deed was rejected. To this ruling the appellant excepted, and his exception was allowed.

Without deciding whether a deed acknowledged before the auditor of a county, and not authenticated by his official seal, is void, we hold that the defect in the acknowledgment of this deed, if there was any defect, was cured by the act of the territorial legislature, approved November 10, 1873, entitled "an act curing defective acknowledgments:" Laws of Washington, 1873, 481.

We think the cause must be returned to the lower court for this error. The most important question presented by the affirmative defenses, hinge upon the recitals of the deed which was excluded from the evidence, and as to all of the questions, we doubt whether this initial error did not operate to prevent a full and fair investigation in the court below.

The judgment of the court below is reversed, and the cause remanded for further proceedings.

WINGARD, A. J., and HOYT, A. J., concurred.

LEWIS *v.* HART.

Filed August —, 1885.

CERTIFICATION OF TRANSCRIPT—FILING BRIEF—WRIT OF ERROR.—A writ of error will be dismissed if the transcript be not properly certified, or if the brief of plaintiff in error be not filed within the time prescribed by rule 10 of the supreme court.

ERROR to the district court of the first district. The opinion states the facts.

Thos. C. Griffiths, for the plaintiff in error.

GREENE, C. J. This cause comes on to be heard upon the printed brief of plaintiff in error, defendant in error not appearing. Looking into the transcript, we find it not well certified to this court as a complete transcript. For this cause the writ of error must be dismissed. There is also another ground for dismissal, namely, that the brief of plaintiff in error was not filed within the time prescribed by rule x. of this court.

Dismissed at costs of plaintiff in error.

HOYT, A. J., and TURNER, A. J., concurred.

SMITH ET AL., LIBELLANTS, *v.* THE SHIP "CHALLENGER" AND MOUNTFORD ET AL., CLAIMANTS.

Filed August 5, 1885.

ADMIRALTY RULE 16—ASSAULT AND BEATING—REMEDY FOR IS IN PERSONAM.—Under admiralty rule sixteen, the ship cannot be proceeded against *in rem*, in any case the *gravamen* of which is an assault or beating. The remedy, in such case, is by an action *in personam* against the owners.

APPEAL from the district court. The opinion states the facts.

Struve, Haines & McMicken, for the appellants and claimants.

Burke & Haller, for the appellees and libellants.

HOYT, A. J. The amended libel in this cause alleges, in substance, that in the month of May, 1882, the libellants shipped on the "Challenger" at the port of Philadelphia for a voyage from that

place to New Tacoma, Washington territory; the libellant Smith shipping in the capacity of third mate, the libellant Matson as carpenter, the libellant Schaeffer as deck boy, and the others as seamen, at the wages specified in the libel. That they signed shipping articles. That the mates of said ship were men of violent temper, and cruel and inhuman dispositions, which fact was at all times known to the master, but not to the libellants until after the commencement of the voyage. That during the whole course of the voyage said libellants, without cause, were wrongfully subjected to beatings, imprisonments, cruelties and abuse by the mates of said ship, and that the master failed, neglected and refused to use due diligence to protect the libellants from such acts and that each of said libellants had been damaged thereby in a certain sum set out in said libel. Then follows an allegation that wages are due said libellants as follows: Warrow, thirty-seven dollars and fifty cents; Olander, thirty-four dollars; Anderson, twenty dollars and twenty-five cents; Herbert, fifty dollars; Ross, twenty-nine dollars and twenty-six cents; Danielson, twenty-two dollars and seventy cents; Francisco, thirty-three dollars and seventy cents; Hanson, twenty-one dollars and twenty cents; Dahlgren, twenty-eight dollars and five cents; Johnson, twenty-nine dollars and twenty cents; Andrea, twenty-five dollars and twenty cents; Matson, one hundred and sixty-two dollars and sixty-six cents;—and a prayer for those various amounts in addition to the amount of damages above mentioned.

The claimants excepted in detail to all the allegations in the amended libel except those referring to the shipment of the libellants and the amount of wages due them. These exceptions, twenty in number, were all overruled by the court.

Issue was then made upon the allegations of said libel, and the cause heard upon proofs duly taken and a decree entered against the said ship and her claimants in favor of each of said libellants (excepting certain of them, who had, pending the action, compromised their claims), both for damages on account of said ill-treatment and for the wages found due, with costs. And from this decree claimants have prosecuted this appeal.

The question of most importance in the cause, and the one to which counsel have directed most of their argument, is as to the effect of admiralty rule sixteen, it being contended by appellants that the damages claimed for in this libel by reason of said rule could not be enforced against the ship, even although her owners might be liable in a suit *in personam*, while the appellees insist that, though said rule bars an action against the ship for an assault and battery as such, yet it has no application to claims of the kind set out in their libel, which are for a breach of the contract for protection and fair treatment, implied in the contract for service, by reason of certain assaults and beatings, and not an action to recover directly for damages from such assaults and beatings. Said rule sixteen reads as follows: "In all suits for an assault or beating on

the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only."

It is conceded that the supreme court had the power to adopt this rule. It follows that it must be given such a construction as will give force to the words therein used, and meet the object for which it seems to have been adopted.

What, then, was the situation before this rule was promulgated as to the liability of the ship for damages of this nature? Was she liable for every act of assault or beating committed on board of her? or was she liable only when such assaults and beatings were made under such circumstances as to constitute a violation of the contract or duty of protection and fair treatment? We think the latter, as, in our opinion, the only remedy the injured party on shipboard, as elsewhere, ever had for a single willful assault as such was an action *in personam* against the person who inflicted the injury, and it seems to us that, without such rule, it could never have been held that either the ship or her owners were liable in any form of action, from the simple fact that one person upon said ship had committed a willful assault upon another, as we think that the only ground upon which one far away from, and in no way connected with, such assault could be held liable, would be that he had in some way violated his contract, either express or implied, with such injured party.

To give the construction to said rule contended for by appellees would, in our opinion, entirely nullify it, and leave the matter just where it was before its adoption. Without it, the action could be *in personam* only in all cases where the ship was not liable, and we do not see how either she or her owners could be held thus liable for damages of this nature on other grounds than that the allowing of the same was in violation of some duty imposed by contract, or in consequence of negligence in the performance of some duty enjoined by law, and it is just for such violations or neglect that appellees claim the right to recover herein.

If, however, said rule is construed as contended for by appellants, it becomes at once of vital force, for it says to the person who has had his contract for protection violated by assaults or beatings that though he could, before, have proceeded against the ship, he must now content himself with a suit *in personam*.

We are not discussing the wisdom or the justice of said rule, as these question address themselves only to the power that made it.

We suppose that it was thought necessary in the interest of commerce to prevent the frequent attachment of vessels at ports far away from home, for liabilities which could not have been contemplated, and for which, therefore, no preparations could have been made, and that public interest demanded that occasional individual injustice should be suffered rather than that commerce should be so inconvenienced and obstructed.

It is true that in many cases, as in that at bar, great hardship and injustice may be done by compelling the injured party to go to the home of the owner to obtain redress, yet, in most cases, where there

has been really serious abuse, the damages recovered will be such as to warrant such a course, and, on the whole, the injustice may not be greater than to compel such owner to meet the tying up of his ship at any port, however remote or small, that she may chance to visit, upon every allegation, real or pretended, that by assault or beating, the said contract had been broken.

This construction is strengthened by the language of the rule, for, had the intention been to provide a remedy for an assault and battery, as such only, the words assault or beating were not the most appropriate, while, if the intention was to cover all cases of actionable personal abuse, as well those that were as those that were not violations of such contract, no more apt words could have been found to express such intention.

Besides, the rules, of which this under consideration is one, have substantially covered the entire field of maritime jurisdiction, and have pointed out the proper proceeding in all, or nearly all, classes of cases; authorizing certain claims to be enforced *in rem*, certain *in personam*, and, again, others, by either or both of such remedies; and if it had not been the intention, by this rule, to indicate the procedure in all cases of liability growing out of assault and battery there would have, probably, been another rule for the class of liabilities not so provided for.

We see nothing to induce us to hold that, having had its attention called to this matter of assault and beatings, the supreme court would have provided by rule for one class of liabilities arising therefrom, and left another class without any rule for its government.

The rule, fairly interpreted, is broad enough to cover all cases the *gravamen* of which is an assault or beating, and we think that such should be its construction.

To construe it otherwise would allow damages growing out of an assault or beating in one form of action to be enforced against the ship, while the same elements of damage in another form of action would not be so enforced; and this would overturn a well-established principle in admiralty, that substance and not form is the thing to be considered.

But appellees insist that even if this rule is construed as above stated, yet it does not have these claims, as the injuries alleged are not those arising from assaults and beatings only, but also include those arising from much other ill treatment. We think, however, that the principal element of alleged damages is for injuries received by assaults and beatings, and that these claims must be held to be within said rule. We have discussed this question upon the language of said rule and the circumstances of its adoption, rather than in the light of authority, as it was concluded upon the argument that but little light can be found in the books upon this subject. Such light, however, as is shed by the authorities, both negative and positive, upon this subject, seems to favor the construction given above. A large number of cases have been brought to recover for this class of damages, and have, with a single exception, been prosecuted *in per-*

sonam, while in the single case where an attempt was made to hold the ship, the ruling of the court was that she was not liable: See The Guiding Star, 1st Federal Reporter, 347.

It is, of course, true that the negative authority above mentioned is entitled to but little weight, for it may have been out of abundant caution only that attorneys have always prosecuted *in personam* instead of *in rem*; yet, when we consider the manifest advantages in many cases of the proceeding *in rem*, we must conclude that the fact that it has never been resorted to, shows pretty conclusively that the bar of the country had construed such rule as a bar to the proceeding *in rem*.

The damages claimed for could not then be recovered in this action and should have been stricken from the libel.

Appellants do not question the decree of the court below for wages due the several libellants, but claim that there should have been no allowance of costs, the proof showing, as they allege, that they had, before suit, made a full tender of such wages; but, as the lower court seemed to think that a sufficient tender had not been shown, we are not disposed to disturb the finding for costs in favor of appellees in the court below, as it does not sufficiently appear that they were wrongfully allowed.

There must be a decree entered here in favor of libellants for the wages found due, and for costs incurred in the lower court, from which must be deducted the costs of this appeal, which are allowed appellants.

WINGARD, A. J., and TURNER, A. J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 9,781.

ZELLERBACH v. ALLENBERG ET AL.

Department Two. Filed August 17, 1885.

FRAUD—SETTING ASIDE JUDGMENT—DEFAULT OF PLAINTIFF.—A judgment at law will not be set aside on the ground of fraud, unless the fraud was practiced in the very act of obtaining the judgment, without any default, either of the party against whom the judgment was rendered, or his counsel.

APPEAL from a judgment of the superior court of Sierra county, entered in favor of the defendants. The opinion states the facts.

R. H. Taylor and *T. M. Osment*, for the appellant.

Jarboe & Harrison, for the respondents.

MYRICK, J. The complaint in this case was filed to set aside, on the ground of fraud, a judgment which had been obtained by Allenberg and Goldstein against Zellerbach. In the court below, judgment on demurrer was rendered for the defendants.

The case, as presented by the plaintiff herein, why the judgment in the former case should be set aside, is substantially as follows: Allenberg and Goldstein commenced an action against Zellerbach to foreclose a mortgage executed by the latter to Allenberg. In the complaint in that case, it was alleged that the mortgage was given to secure the payment of a note for fifty thousand dollars and interest executed by Zellerbach to Goldstein, an indebtedness of Zellerbach to Allenberg of nine thousand dollars and interest, and advances and loans to be made by Allenberg to Zellerbach. It was also alleged that Allenberg paid out twenty-five thousand dollars in excess of issues, in the management of the mortgaged property. The mortgaged property consisted of several mines and ditches and appurtenances, embracing all the property of Zellerbach in the county, together with thirty thousand shares in a mining company and one thousand shares in a canal company. Zellerbach, in his complaint in this case, avers that, in his answer in the former case, he admitted the making of the note and the indebtedness to Goldstein, but claimed that Allenberg had received fourteen thousand dollars for dividends on the canal company stock and one thousand five hundred dollars cash.

The court in that action found that Zellerbach was indebted, on the obligations alleged in the complaint therein, in the sum of ninety-one thousand four hundred and seventy-four dollars and fifteen cents, and that Allenberg had paid out eleven thousand two hundred and fifty-one dollars and forty-one cents in the management of the property, and rendered judgment of foreclosure and sale. The plaintiff, Zellerbach, then proceeded, in his complaint in this action, to aver that he was extensively engaged in business; that Allenberg was his confidential agent and manager of his business, having almost exclusive control thereof; that Allenberg represented to plaintiff that money was needed to carry on the business, and that Goldstein had money to loan; that, acting solely on the representations of Al-

lenberg, he drew on Goldstein for thirty thousand dollars, which was paid; that Allenberg handed plaintiff seven thousand eight hundred and fifty-three dollars and fifteen cents, representing it to be a loan from Goldstein, and that the fifty thousand dollar note was given for these sums and interest thereon; that at the time he gave the note, and when the decree was rendered in the former action, he believed he was indebted to Goldstein in the sum named in the note, less the credits claimed, but that, since the date of that decree, he had been informed and believed, and therefore alleged, on information and belief, that the sums supposed by him to have been loaned to him were, in fact, moneys which Allenberg had abstracted from him in the management of the business, and induced, by collusion with Goldstein, plaintiff to believe was the money of Goldstein, and was, in truth, the property of plaintiff.

It will be observed that the plaintiff in this action does not aver that Allenberg or Goldstein, by any act, prevented him from ascertaining, before he executed the note, the true condition of his affairs; neither does he aver that he could not, with the ordinary prudence of a business man, have ascertained such condition; for aught that appears, he might have examined his books and accounts then, and he might have examined them at any time before the trial of the former case. If it be true that Allenberg falsely abstracted the plaintiff's funds, and by collusion with Goldstein loaned them to plaintiff, it does not appear but that plaintiff might, with reasonable attention to his business, have ascertained the fact and made the defense in the former action.

It is not enough for the purposes of this action that he should have been ignorant of the alleged wrong at the time of the former trial; that ignorance must have been caused by the acts of Allenberg or Goldstein, or by his own misfortune, which reasonable prudence would not have guarded against. He does not aver that Allenberg had the entire management of the business, or that he made false entries in the books, or prevented inquiry or examination; nor does he aver any fact tending to show that Allenberg or Goldstein prevented him from making a defense nor from ascertaining the facts necessary to the defense.

Where a judgment is attacked and sought to be set aside for fraud, the "fraud must have been practiced in the very act of obtaining the judgment, or else it will be concluded by the judgment at law, where fraud is equally a defense as in equity:" 2 Storey's Eq. Jur., 1,575.

"The rule of the best considered and more recent cases upon the subject is, that the party must have failed in obtaining redress in the suit at law by the fraud of the opposite party, or inevitable accident or mistake, without any default either of the party or his counsel:" 2 Storey's Eq. Jur., 1,574, note: French v. Garner, 7 Porter, 549; Ede v. Hazen, 61 Cal, 360; Weir v. Vail, 3 West Coast Rep., 405; U. S. *v.* Throckmorton, 98 U. S. 61.

We think the judgment of the court below, in this case, is correct; it is, therefore affirmed.

MORRISON, C. J., and THORNTON, J., concurred.

No. 8,872.

ESTATE OF DALRYMPLE, DECEASED.

Department Two. Filed September 18, 1885.

CONTEST OF WILL—CONTESTANTS ARE PLAINTIFFS.—On the trial of the contested probate of a will, the contestants are plaintiffs and the petitioner defendant, under sections 607 and 1,312 of the code of civil procedure.

THE SAME—CONFLICT OF EVIDENCE—VERDICT.—The verdict of the jury on the issues submitted to them on such contest will be upheld when the evidence is conflicting.

EVIDENCE—CONDITION OF TESTATOR'S MIND PRIOR TO EXECUTION OF WILL.—A witness may testify as to the condition of the testator's mind at a period prior to the execution of the will, when the disease causing his insanity was a progressive one.

WAIVER OF RIGHT TO SUBMIT ISSUES TO JURY—FINDINGS.—On such contest, if the contestants neglect to submit certain issues to the jury, they waive their right so to do, and it then becomes the duty of the court to find upon such issues.

APPEAL from an order of the superior court of Marin county, admitting a will to probate. The opinion states the facts.

H. Dorsey Gough and *L. Quint*, for the appellants.

W. H. Tompkins and *Flournoy, Mhoon & Flournoy*, for the respondent.

FOOTE, C. The tenth and eleventh issues allowed to be tried by the jury in this, a case of the contested probate of a will, were not in themselves improper, under the rule laid down in Gharkey case, 57 Cal., 274.

The contestants claimed those issues to be substantially a *repetition* of the seventh and eighth tendered by them, and allowed by the court, and that those last, wherein the jury found against them, were the two issues upon the matter to which they related. If this be true, contestants cannot complain, since the findings of the jury upon those issues support *pro tanto* the order or decree made and entered by the court. There can be reasonable ground to doubt that section 607 and section 1,312, subdivision 4, code of civil procedure, as construed in the Estate of Collins, Myrick's Reports, 73, constituted "On the trial the contestants, plaintiffs and the petitioner, defendant." The reason there given, that the matter is entirely controlled by the statute, seems to be conclusive.

The court rightfully said: "As to all matters involved in the issues raised by the contest, the contestant is plaintiff, and must go forward."

The evidence submitted to the jury being conflicting upon all the material issues, their verdict should be upheld.

Objection is urged to the competency of the testimony of various witnesses for the proponent. It is claimed that, not being experts, they should have established their intimacy with the testator, and before being permitted to testify as to their opinions of his sanity or insanity, should have stated the reasons therefor.

The testimony as delivered by the witnesses appears to have made evident the intimacy required, and to have included the reasons for their opinions.

The objection that the witnesses testified to the condition of mind of the testator at times too remote from that of the execution of the

will, is not tenable. The disease causing his insanity was a progressive one.

The court committed no error in admitting or excluding any of the evidence offered: Section 1,870, subdivision 10, C. C. P.; People v. Sanford, 43 Cal., 33; Estate of Toomes, 54 Cal., 509.

The law, as contained in the instructions given by the court to the jury, and allowed to go to them as requested by counsel, is properly stated. The modifications of instructions made were correct, as was also the refusal of certain of them.

That tribunal seems to have had in view, in its action in the premises, the law as laid down in the Gharkey case, 57 Cal., 274, and Estate of Low, Myrick's Reports, 147, and applied the correct principles, therein stated, to the facts of the case at bar.

There was no question of marriage involved in the contention and the jury were not misled, but disabused of any wrong impression, which they might otherwise have had from the proposed instructon asked by contestants on that subject, and refused orally in their presence by the court, as also from the testimony on that point by Mr. Gough.

The conduct of the court in studiously keeping the jury upon the beaten tract as to the issues to be by them tried, is to be commended.

Its action in finally making and entering its order or decree without allowing the contestants, at the time proposed by them, to have the issue tried, whether or not the death of the testator had been the result of the illness under which he suffered at the time of the execution of the will, was proper.

The testimony was ample to support the finding of the court upon that point, and the contestants, by not including it among the issues they first submitted to the jury, and upon which the jury found, waived such right, and it then became the duty of the court to consider the evidence and make a finding thereon. The province of the court and jury in such case is stated in the estate of Thomas Collins, *supra*. "The theory of this statute seems to be as follows: A paper is offered as a will; it is contested on any one or more of the statutory grounds; a jury is sworn to try the issues raised by the contestant; not to pass upon any other fact. Upon those issues the contestant is plaintiff. It may happen that a contest is raised as to one only of the statutory grounds—for instance, say, not witnessed. That issue is the only one before the jury, and their verdict will be conclusive upon it. But upon the rendering of the verdict upon that issue, the court could not admit the will to probate. The court, not the jury, will hear evidence on all the points required by the statute, not raised by the contest, and admit or reject."

The order of the court admitting the will to probate and appointing Peter Alferitz administrator, etc., and that denying a new trial, ought to be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the orders are affirmed.

WEST COAST REPORTER.

WHOLE NO. 92. OCTOBER 1, 1885. VOL. VII. NO. 12.

SUPREME COURT OF NEVADA.

THOMPSON *v.* RENO SAVINGS BANK ET AL.

Filed September 18, 1885.

CORPORATIONS—JUDGMENT CREDITOR—LIABILITY FOR UNPAID SUBSCRIPTION.—A judgment creditor of a corporation may maintain an action against a stockholder, to recover the amount of the latter's unpaid subscription to the corporate stock, without having made any effort to induce the corporation to make a call for such subscription.

THE SAME—STATUTE OF LIMITATIONS, WHEN COMMENCES TO RUN.—The liability of a stockholder of a corporation for unpaid subscriptions is continuing, and the statute of limitations does not commence to run against the same until it has been set in motion by some adverse action, such as a call by the corporation.

APPEAL from a judgment of the seventh district court of Washoe county, entered in favor of plaintiff, and from an order denying defendant's motion for a new trial. The opinion states the facts.

Wm. Webster and *S. D. King*, for the appellant.

John F. Alexander, for the respondent.

BELKNAP, C. J. This is a suit in equity brought by respondent, a judgment creditor of the Reno Savings Bank, against appellant Huffaker, to recover the amount of his unpaid subscription to the capital stock of the bank. The suit is based upon facts corresponding in all essential respects with those in Thompson v. Lake *et al.*, 6 West Coast Rep., 533, and the decision in that case, in so far as it is applicable, will be treated as decisive of this one, without further notice.

The first objection which we are asked to consider is, that the complaint does not state a case entitling the plaintiff to sue. It is urged that subscriptions to the capital stock of the corporation are payable upon the call of the company, and that a creditor, to maintain a suit of this nature, must, before instituting it, make an effort to induce the corporation to make the call, and that no proper effort in this behalf has been made. In support of this view, we are referred to a number of cases holding that a stockholder or creditor of a corporation may, under certain circumstances, and to prevent a failure of justice, institute and control a suit in his own name, involving the rights of the corporation, if it has refused to take action. In this class of cases, the right of action is primarily in the corporation, and it is entitled to the fruits of the litigation, but the stockholder or creditor is allowed to sue in order to protect

the rights or property in which he has an interest. The principle involved in these cases has no application to cases of the nature of the one at bar, which is of the nature of a creditor's bill, brought by a plaintiff entitled in his own right to the relief which the judgment affords.

Another objection arises upon the order of the district court overruling the defense interposed of the statute of limitations. Appellant's subscription to the stock was made in the month of April, 1876, and it is said that a recovery thereon was based within four years thereafter.

The statutes relating to corporations provide that the by-laws may prescribe the times, manner and amounts in which payments of subscriptions to the capital stock may be made. If the by-laws make no provision of this nature—and none was made by the by-laws of the bank—the trustees have power to require payment of such instalments as they may deem proper: Comp. Laws, sec. 3,398. The trustees of the bank, being subscribers to its capital stock, availed themselves of the privilege afforded by the statute, and made no call except thirty per cent of the amount subscribed, at the commencement of business operations. No action has ever been taken by them to recover any portion of the remaining seventy per cent of the subscribed capital. This unpaid amount was a part of the capital of the bank allowed to remain in reserve in the hands of the stockholders, but subject to call when needed. It was a continuing liability of the subscriber, which neither the indulgence of the trustees nor mere lapse of time could defeat.

The statute of limitations is not available as a defense, because it has not been set in motion by any adverse action, such as a call by the corporation upon appellant to pay his subscription.

If the insolvency of the corporation set the statute in motion, sufficient time had not elapsed when this suit was commenced to bar a recovery: Allibone v. Hagar, 46 Pa. St., 48; Curry v. Woodward, 53 Ala., 371; Harmon v. Page, 62 Cal., 448; Thompson on Liability of Stockholders, secs. 290, 291.

The judgment and order of the district court are affirmed.

SUPREME COURT OF CALIFORNIA.

No. 9.978.

MELLUS v. MELLUS.

Department Two. Filed September 17, 1885.

AVERMENTS OF COMPLAINT—WHEN NOT BINDING ON PARTY.—A party to an action is not bound by the averments of a complaint in another action to which he is not a party.

THE RECORD HELD TO SHOW NO ERROR.

APPEAL from a judgment of the superior court of Los Angeles county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

F. H. Howard and *J. R. Scott*, for the appellant.

David Lyon and *Howard & Roberts*, for the respondent.

FOOTE, J. Action on four promissory notes. Appeal from the judgment for plaintiff, and the order denying defendant a new trial.

The complaint stated a cause of action and the demurrer thereto was properly overruled. From the findings of the court it appeared that recovery on the first note was, as claimed in the answer, barred by limitation under section 337, code of civil procedure. The recitals of facts in those findings negative the existence of all other defenses set up in the answer. And the material issues raised by the pleadings were considered and passed upon.

The evidence, although in some respects conflicting, sustains the findings, and they support the judgment. The court reserved its ruling upon an objection made by the plaintiff, to the admission in evidence of a complaint filed in another action by E. A. Mellus, assignee of Adelida Alexander against Lalla Mellus, and the defendant claims has never ruled thereon.

A ruling should have been made upon that objection, but the defendant here suffered no injury. That complaint was incompetent as evidence in this action. Its allegations were not binding on the plaintiff here. It was filed in an action which was dismissed before that at bar was brought. The parties to the two actions were not identical. The fifth point made by the defendant, for the first time in this court, should not be considered. The record shows no error, and the judgment and order should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 8,014.

ARGUELLO v. BOURS ET AL.

Department One. Filed September 21, 1885.

DEED—NAME OF GRANTEE INSERTED WITHOUT AUTHORITY—LEGAL TITLE.—A deed, duly signed and acknowledged by the grantor, does not convey the legal title, if, after delivery, the name of the grantee is inserted without any authority from the grantor. This result follows notwithstanding the abolition of all distinctions between sealed and unsealed instruments.

THE SAME—POSSESSION OF GRANTEE UNDER CONTRACT OF PURCHASE.—Nor will the legal title pass to the grantee whose name is thus inserted, by reason of the fact that he had entered into possession of the land, under a contract of purchase with the grantor, and had fully performed the conditions thereof on his part.

THE SAME—EQUITABLE DEFENSE IN EJECTMENT—VENDEE IN POSSESSION UNDER CONTRACT.—Under the code practice a defendant may plead, as a defense to an action of ejectment, that he is in possession under a contract of purchase, the conditions whereof have been fully performed on his part; in other words, that he is in possession under a contract which gives him the right of possession, and that he is entitled to retain the same as against the bare naked title of his vendor, which the latter holds disconnected from any real interest.

THE SAME—FACTS CONSTITUTING EQUITABLE DEFENSE MUST BE PLEADED.—But, whether the defendant relies upon his equities merely as a defense to the ejectment, or alleges them in a cross bill and bases on them a prayer for equitable relief, the facts on which he relies must be set forth in the answer, as fully as it would be necessary to allege them in the stating part of a bill in equity, praying a decree for a conveyance of the legal title. In alleging such defense it is always safer to aver that the price paid was a just and fair price and the full value of the premises.

THE SAME.—Under such circumstances the defendant will usually pray for equitable relief. But if, by lapse of time or for any other reason, he may have lost his right to an equitable decree, he will still be entitled to rely on his perfect equity as a defense to an action brought to deprive him of the possession.

APPEAL from a judgment of the superior court of San Joaquin county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

D. M. Delmas, for the appellant.

Terry & McKinne and *J. H. Budd*, for the respondents.

MCKINSTRY, J. This action is ejectment brought by plaintiff as devisee under the will of Jose R. Arguello, deceased; the complaint alleging that Jose R. Arguello was seized in fee of the premises at the time of his death.

The answer admits that Jose R. Arguello was, in his lifetime and up to the fourteenth day of September, 1876, the owner in fee of the premises, but alleges that on that day he sold and conveyed said premises to the defendant for the consideration of four thousand dollars, which was the full value thereof, and which sum was on that day fully paid by defendant Bours to said Arguello, and that said defendant entered into possession of said premises under said sale, and not otherwise. That said defendant is, and since said fourteenth day of September, 1876, has been the owner in fee of said premises, and that defendant, F. A. Ruhl, at the time of the commencement of this suit, occupied and now occupies said premises as the tenant of the defendant Bours, and said Ruhl has and claims no right, etc., except as tenant, etc.

If the foregoing is to be construed as being, in legal effect, merely a denial of the averments of the complaint, the court below erred in refusing to give to the jury the instruction asked by counsel for the plaintiff, which reads as follows:

"If the jury believe from the evidence that when the deed offered in evidence herein, and dated September 14, 1876, came into the hands of the defendant B. W. Bours, it had already been signed and acknowledged by J. R. Arguello, and that the name of B. W. Bours did not then appear therein, and that afterwards one Inglis, by direction of said Bours, in the absence of said Arguello, and without any authority from him, wrote the name of said Bours therein, and that thereupon said Bours took said deed and filed the same for record, the plaintiff is entitled to your verdict."

Certainly, the deed did not convey the legal title if Arguello never authorized the insertion of the name of defendant. That such authorization might be proved by circumstantial evidence does not affect the decision of the question.

Nor is the decision of the question affected by the abolition of all distinctions between sealed and unsealed instruments: Civil Code, 1,629. As to unsealed instruments, a blank could always be filled in by a person authorized by the maker. But the instruction above recited speaks of the absence of "any" authority from Jose R. Arguello for the insertion of the name of Bours.

It is not necessary to determine whether the averment that Jose R. Arguello "conveyed" to defendant Bours on a certain day, and that the latter, since that day, has been "the owner in fee," may be disregarded.

Some of the instructions given to the jury were confusing and erroneous. The court seems not to have decided whether the answer made an issue simply as to the plaintiff's legal title, or alleged equities, which entitled defendants to retain possession of the demanded premises, but to have treated it as doing both. And the jury were authorized (so far as the court below could authorize the jury) to base their general verdict either on a finding that plaintiff did not have the legal title, or, if plaintiff had the legal title, that defendant Bours was entitled to retain the possession by virtue of an executed contract of sale and purchase. To reach the second question suggested (was the defendant in possession under such contract fully executed on his part), the jury were authorized to construe, interpret and determine the legal effect of an instrument in writing. "If the jury believe * * * that said Arguello signed and acknowledged a deed for said property, and sent the same to the defendant, omitting to insert the name of the grantee, that by reason of said omission, the deed signed by the said Arguello was not sufficient to pass title," etc.

The court also charged: "If the jury believe, from the evidence, that when the deed, offered in evidence herein, came into the hands of the defendant Bours, it had already been signed and acknowledged by J. R. Arguello, and that the name of R. W. Bours did not appear therein, and that afterwards one Inglis, by direction of defendant, in the absence of said Arguello, and without any authority from him, wrote the name of said Bours therein, and that thereupon said Bours took said deed and filed the same for record, then

such deed, the court instructs you, would not be sufficient to pass the title, unless you further find, from the evidence, that the defendant purchased the premises therein named, from said Arguello, paid the purchase price, and entered into and held possession thereof, claiming the same as his own, by virtue of such purchase and payment."

The jury were thus told, in effect, that, although the name of Bours was inserted in the "deed" without any authority, express or implied, from Arguello, yet such deed would be sufficient "to pass the title," if the defendant purchased the premises, paid the purchase price and entered into possession, etc. This must be construed as an instruction that, if defendant entered under a contract, and had fully performed its conditions on his part, the legal title passed to him by the deed.

For these reasons, the judgment and order must be reversed.

Inasmuch, however, as another question has been discussed by counsel, we deem it proper to say that, under our system of practice, a defendant may plead, as a defense to "ejectment," that he is in possession under a contract of purchase, the conditions whereof have been fully performed on his part; in other words, that he is in possession under a contract, which gave him the right of possession, and that he is entitled to retain possession as against the bare, naked title of his vendor, which the vendor holds disconnected from any real interest. A perfect equity, united to the possession, is, under our system, equivalent for all purposes of defense to a legal title: Morrison v. Wilson, 13 Cal., 494. A vendee in possession under an executory contract, the conditions of which have been performed on his part, may avail himself of his equitable title as a defense to an action of ejectment brought against him by the holder of the legal title: Love v. Watkins, 40 Id., 547. A mere equitable title to land, if of such a character as in equity entitles the holder to the possession, is a sufficient defense to an action for the possession brought by the holder of the legal title: Willis v. Wozencraft, 22 Id., 607.

But whether a defendant relies upon his equities merely as a defense to the ejectment, or alleges them in a cross bill, and bases on them a prayer for equitable relief, the facts must be fully set forth in the answer, as fully as it would be necessary to allege them in the stating part of a bill in equity, praying a decree for a conveyance of the legal title: Miller v. Fulton, 47 Cal., 146; Bruck v. Tucker, 42 Id., 352; Kentfield v. Hayes, 57 Id., 411. In Kenyon v. Quinn, 41 Cal., 325, and Cadiz v. Majors, 33 Cal., 288, the equities of the defendant were not pleaded. The *dicta* in the decisions of cases where the answer consisted of mere denials, that the equitable defense should be pleaded with a prayer for affirmative relief, are not to be regarded as authoritative.

In an action of "ejectment" by a plaintiff having the legal title, the defendant may rely on a contract of purchase which gave him the right of entry, and which has been completely executed and

performed on his part, together with his continued possession. But all the facts on which he relies should be averred in the answer. In view of the intimation in Bruck v. Tucker, it will always be safer to aver (as was done in this case) that the price paid was a just and fair price and the full value of the premises.

Of course, under such circumstances, the defendant will usually pray for equitable relief. If, by lapse of time, or for any other reason, he may have lost his right to an equitable decree, he will still be entitled to rely on his perfect equity as a defense to an action brought to deprive him of the possession.

Judgment and order reversed and cause remanded for a new trial.

ROSS, J., and MCKEE, J., concurred.

No. 9,973.

MURPHY v. SNYDER.

Department Two. Filed September 22, 1885.

FORCIBLE DETAINER—ACTION BY LESSEE.—LEASE AS EVIDENCE.—In an action, by a lessee, for a forcible detainer, his lease is admissible in evidence, in connection with his former possession, to show the extent of such possession, and that he was entitled thereto.

THE SAME—CONCLUSIONS OF LAW IN FINDINGS.—In such action, a direction by the court, added at the conclusion of the findings of fact, that "judgment be entered in accordance with the foregoing findings in favor of plaintiff for restitution of said premises, and for his costs and disbursements in this action," is equivalent to a conclusion of law, that the plaintiff is entitled to recover the possession of the premises sued for.

APPEAL from a judgment of the superior court of Santa Barbara county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. On the trial, the plaintiff was permitted to give in evidence a lease of the premises, under which he claimed. The further facts appear in the opinion.

R. M. Dillard, C. E. Huse, J. T. Richards, and *J. J. Boyce,* for the appellants.

McNulta & Oglesby, for the respondent.

THORNTON, J. Action for a forcible detainer. There was no error in admitting in evidence the lease to plaintiff. It was admissible in connection with plaintiff's former possession to show the extent of such possession.

In an action for a forcible detainer, the plaintiff is entitled to recover on showing the forcible detainer, and that he is entitled to the possession at the time of such forcible detainer: C. C. P., sec. 1,172. The lease was admissible also, to show that plaintiff was entitled to the possession.

The objections of plaintiff to certain questions asked by defendant of witness Mullaney, were properly sustained—as was also the objection to a question asked plaintiff. These questions related to matters which were entirely irrelevant to the issues to be tried.

There was evidence tending to prove the allegations of the complaint.

It is urged that the court below, in giving its decision, stated no conclusion of law. The record shows that after finding the facts the court adds this direction: "Let judgment be entered in accordance with the foregoing findings in favor of plaintiff for restitution of said premises, and for his costs and disbursements in this action."

This, in our judgment, is, in substance, a conclusion of law stated by the court, that the plaintiff is entitled to recover the possession of the premises sued for. It would be yielding too far to mere form to hold that the above is not a conclusion of law.

Judgment and order affirmed.

MYRICK, J., and MORRISON, C. J., concurred.

No. 11,217.

DALZELL *v.* SUPERIOR COURT OF SAN BENITO COUNTY.

Department One. Filed September 23, 1885.

APPEAL FROM JUSTICE'S COURT—SERVICE OF NOTICE OF—AFFIDAVIT OF.—Where the record of a case on appeal from a justice's court is silent as to service of the notice of appeal, the fact of service may be proved by affidavit; but the affidavit must show that all the requirements of the law to effect service were complied with.

THE SAME—AFFIDAVIT OF SERVICE ON ATTORNEY ABSENT FROM OFFICE.—An affidavit of service which states that the notice of appeal was served on the attorney for respondent "by leaving it on the desk of said attorney in the front room of his law office * * * between the hours of eight in the morning and six in the afternoon of the sixth day of June, 1885, * * * and that there was no person in said front room of said office at the time said notice of appeal was left there," is insufficient to show constructive service of the notice upon an attorney absent from his office, under section 1,011 of the code of civil procedure.

THE SAME—SERVICE OF NOTICE JURISDICTIONAL—DISMISSAL OF APPEAL.—Service of such notice of appeal is a jurisdictional fact, and if service has not been made within statutory time, and according to the requirements of the statute, the appellate court derives from the notice no actual jurisdiction of the case, and the appeal is dismissible *ex mero motu*, or on motion of respondent, for want of jurisdiction.

APPLICATION for writ of review. The opinion states the facts.

Montgomery & Scott and *N. C. Briggs*, for the petitioner.

B. B. McCloskey, for the respondent.

MCKEE, J. Application for a writ of review.

It appears from the allegations of the petition that the superior court of San Benito county, upon the hearing of a motion to dismiss an appeal taken from a judgment rendered by a justice's court, finding that there was no notice of appeal to give the court actual jurisdiction of the case, ordered a dismissal of the appeal; and it is contended that this order was in excess of the jurisdiction of the court, and void, because service of the notice of appeal, as prescribed by law, was substantially proved upon the hearing of the motion to dismiss.

The papers in the case, transmitted by the justice to the superior court, did not show any service whatever. But, pending the motion

made to dismiss the appeal on that ground, appellant's attorney filed an affidavit, upon which it was claimed that service of the notice of appeal had been made upon the attorney of the adverse party during his absence from his office.

Where the record of a case on appeal from justice's court is silent as to service of the notice of appeal, the fact of service may be proved by affidavit, but the affidavit must show that all the requirements of the law to effect service were complied with: Mendioca v. Orr, 16 Cal., 368; Doll v. Smith, 32 Id., 476. Service is effected by personal delivery of a copy of the notice to the adverse party, or his attorney; or it may be made during the absence of the attorney from his office, if the office be open, by leaving the notice * * * with his clerk, or other person in charge of the office, or, if there is no person in the office, by leaving it between the hours of eight in the morning and six in the afternoon in a conspicuous place in the office, etc.: Subdivision 1, section 1,011, C. C. P.

The affidavit of service states that the notice of appeal was served on the attorney for respondent "by leaving it on the desk of the said attorney in the front room of his law office * * * between the hours of eight in the morning and six in the afternoon of the sixth of June, 1885," * * * and "that there was no person in said *front room* of said office at the time said notice of appeal was left there," etc.

This is insufficient to show constructive service of notice upon an attorney absent from his office. Taking as incontrovertible the fact that the attorney upon whom service was attempted to be made, was not in the front room of his office at the time, his absence from his office is not deducible from the fact. It is not claimed that "the attorney of respondent" got the notice. In fact, the affidavit states the attorney complained that "he would not have known that an appeal had been taken if he had not seen it in the newspapers."

The proof of service was therefore legally insufficient, and the court did not exceed its jurisdiction in so determining and in ordering a dismissal of the appeal. Service of notice of an appeal is a jurisdictional fact; and if service has not been made within statutory time, and according to the requirements of the statute, to effect service, the appellate court derives from the notice no actual jurisdiction of the case, and the appeal is dismissible *ex mero motu*, or on motion of respondent, for want of jurisdiction: Coker v. Superior Court, 58 Cal., 177; Trobock v. Caro, 60 Id., 304.

Application for writ denied.

ROSS, J., and MCKINSTRY, J., concurred.

No. 9,342.

McKINNEY ET AL. v. ROBERTS.

Department Two. Filed September 23, 1885.

SLANDER—ALLEGATION ON INFORMATION AND BELIEF.—In an action for slander, an allegation in the complaint that on a certain date, and in the presence of a certain person, "as the plaintiffs are informed and believe," the defendant spoke the following words, etc., is not a sufficient averment of the speaking. Such defect goes to the sufficiency of the facts stated, and not to the manner of stating them, and may be taken advantage of by a general demurrer.

THE SAME—COUNSEL FEES MUST BE INCLUDED IN COST BILL.—A defendant in such action, in whose favor judgment is rendered, is not entitled to recover counsel fees, under the act of March 23, 1872, unless the same are included in his memorandum of costs.

APPEAL from a judgment of the superior court of Stanislaus county, entered in favor of the defendant. The opinion states the facts.

Schell & Bond, for the appellants.
W. E. Turner, for the respondent.

SEARLS, C. Plaintiffs are husband and wife, and this is an action to recover damages for slanderous words alleged to have been spoken of and concerning the latter by defendant.

A demurrer to the complaint was sustained, and plaintiffs declining to amend, final judgment was rendered in favor of defendant for one hundred dollars, counsel fees, as provided by section 7 of an act concerning actions for libel and slander, approved March 23, 1872, and for costs in the sum of seven dollars and seventy-five cents. A memorandum of costs was made out, served and filed, as required by section 1,033 of the code of civil procedure, but which did not include the one hundred dollars allowed by the court as a counsel fee.

Appellants claim that the court erred:

First—In sustaining the demurrer to the complaint, and

Second—In including the sum of one hundred dollars as counsel fees in the judgment, the same not having been mentioned in the memorandum of costs as filed.

The language complained of is set forth in the complaint as follows:

II. That on the first day of March, 1883, as the plaintiffs are informed and believe, at the county of Stanislaus, the defendant, addressing William Walker, spoke in the presence of said William Walker and George M. Dewel, the following words, to wit: "If you wish to see or talk to any woman, go over the river and talk to your paramour, Mrs. W. McKinney. By God, sir, she is over at my house visiting to-day."

III. That said words were spoken concerning the plaintiff, Susan McKinney.

IV. That said words were false, except that the said plaintiff, Susan McKinney, was at the house of said defendant on said day, visiting.

The allegation of the complaint is:

"That on the first day of March, 1883, as the plaintiffs are informed and believe, at the county of Stanislaus, the defendant, addressing William Walker, spoke in the presence of said William Walker and George M. Dewel the following words, to wit:"

Plaintiffs are informed and believe defendant spoke certain words. Is this a sufficient averment of the speaking?

Plaintiffs might have been informed, and might have believed the defendant to have spoken the words as charged, and, yet, it may not have been true.

Would proof that they were so informed, and that they thus believed, be sufficient to sustain the action? We think not.

If denied, the proofs should show the words to have been spoken by the defendant, or the action must fail

No amount of proofs that plaintiffs were informed defendant had thus spoken, and that they believed it, would suffice to establish the fact.

The allegata and probata should concur.

The averments of the complaint should be as precise and specific as the proofs are required to be.

The language used does not exclude the hypothesis that defendant did not speak the words. It may be all true, and the defendant be entirely innocent.

Had plaintiffs stated that upon information and belief they averred defendant spoke the words in question, quite a different proposition would be presented.

Suppose defendant had failed to answer, what would have been the effect of admitting the allegations of the complaint?

Why, simply that plaintiffs were so informed, and not that it was true, but that they believed it to be true.

We think the defect goes to the sufficiency of the facts stated, and not to the mode of stating them, and, therefore, that it can be reached by a general demurrer, and that for this reason the demurrer was properly sustained.

2. As to the action of the court in including the counsel fee in its judgment, the same not having been included in the memorandum of costs filed, the order of the court was that defendant have judgment for his costs, and thereupon the clerk seems to have entered the judgment for not only the amount included in the cost bill, but also for the counsel fee of one hundred dollars.

Section 7 of the statutes of 1871-72, p. 533, provides as follows:

"In case the action is dismissed or the defendant recover judgment, he shall be allowed one hundred dollars to cover counsel fees, in addition to the other costs, and judgment therefor shall be entered accordingly."

This court construed the above section in Jacobi v. Bauer, 55 Cal., 554, and held it did not have the effect of entitling a party to recover, except in those cases where, under the code of civil procedure, he became entitled to costs, and accordingly held that, in a case of

slander, a plaintiff who recovered less than three hundred dollars was not entitled to one hundred dollars to cover counsel fees.

It is allowed to cover counsel fees in addition to the other costs.

Treating it as costs, and it becomes necessary that the amount thereof should be included in the memorandum filed, pursuant to section 1,033 of the code of civil procedure.

Not having been included in the cost bill as filed, it was waived.

We think the judgment of the court below should be modified by striking out the sum of one hundred dollars, allowed as counsel fees, and that in all other respects it should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is ordered modified by striking therefrom the sum of one hundred dollars, allowed as counsel fees, and in all other respects the judgment is affirmed.

No. 11,013.

HALL *v.* SUPERIOR COURT OF EL DORADO COUNTY.

In Bank. Filed September 24, 1885.

APPEAL FROM JUSTICE'S COURT—TIME IN WHICH TO PERFECT.—Where a notice of appeal from a justice's court is served and filed, and the undertaking on appeal is filed, within the time prescribed by statute, the superior court obtains jurisdiction of the appeal, and cannot dismiss the appeal for want of jurisdiction. The mere order in which the acts, necessary to the perfection of the appeal, are done, is immaterial, when done within the time limited by the statute.

APPLICATION for a writ of *certiorari*. The opinion states the facts.

George C. Blanchard and *Charles A. Swisler*, for the petitioner.

Irwin & Irwin, for the respondent.

MORRISON, C. J. Application for a writ of *certiorari*.

The petition in this case sets forth that on the fourteenth day of June, 1884, one William Went recovered a judgment against petitioner in a justice's court, in the county of El Dorado, for a sum of money therein stated. That on the twenty-third day of June a notice of appeal in said case was served and filed on the following day, and on the twenty-eighth of June, 1884, a bond on appeal was duly filed.

The petition alleges that the appeal was in all respects regular and according to law, but that on the eleventh day of February, 1885, the cause was brought on for hearing before the superior court of El Dorado county, when a motion was made to dismiss the appeal, which was granted on the grounds, as the order of dismissal shows, "that the notice of appeal was served on the twenty-third day of June, 1884, and filed on the twenty-fourth. That the bond was filed on the twenty-eighth."

There is no doubt that the reasons assigned by the court for making the order of dismissal were wholly insufficient. The notice of appeal was given in time, was filed in time, and so was the bond filed within the time fixed by law. All of these questions were before the court and decided in the case of Coker v. The Superior Court of Colusa County, 58 Cal., 77. It was there held that "to effectuate an appeal from the judgment of a justice of the peace, three things are necessary, viz.: The filing of a notice of appeal with the justice, the service of a copy of the notice upon the adverse party, and the filing of a written undertaking; and all these must be done within thirty days after the rendition of the judgment: Sections 974–978, code of civil procedure." Here the notice of appeal was served and filed and the undertaking on appeal was filed within the time prescribed by the statute, but not in the order named in the statute. The mere order in which the acts are done is not material, but when done within the time limited the appeal is perfected: Coker v. Superior Court, *supra*.

The Coker case is very much in point and settles the question that the appeal was improperly dismissed on the grounds stated in the order of dismissal.

We have shown that the appeal was regularly taken according to the provisions of the code, and the case was, therefore, properly in the superior court for trial. Had that court the right to dispose of the appeal in the summary manner in which it did, or was it not the duty of the court, under the circumstances, to dispose of the case on its merits? The court said, in the case of Levy v. Superior Court of Yolo County, 5 W. C. Rep., 127: "The court (the superior court) can neither give to itself jurisdiction by holding an insufficient undertaking sufficient, nor divest itself of jurisdiction by holding a sufficient bond insufficient."

Neither could the superior court, in the case now before us, divest itself of the jurisdiction properly vested in it by the appeal, by an arbitrary order dismissing the appeal in the manner complained of.

The order of the court below dismissing the appeal is hereby annulled and the cause remanded to the court below to proceed in the same according to the principles contained in this opinion.

MYRICK, J., MCKEE, J., and THORNTON, J., concurred.

No. 9,904.

ESTATE OF LUTZ, DECEASED.

Department One. Filed September 24, 1885.

ORDER REFUSING TO VACATE ORDER FOR DISTRIBUTION NOT APPEALABLE.—An order refusing to set aside and vacate a former order of distribution and settlement of the final account of an executor, is not appealable, under subdivision 3 of section 963 of the code of civil procedure.

APPEAL from an order of the superior court of Sacramento county. The opinion states the facts.

S. F. Geil, and *D. E. Alexander*, for the appellant.

L. S. Taylor, for the respondent.

FOOTE, C. The only matter disclosed by the record here, which this court should consider, is the appeal from an order of the court below, refusing to set aside and vacate a former order of distribution and settlement of the final account of an executor.

In our opinion, such an order is not included in those enumerated in subdivision 3 of section 963, code of civil procedure, and the appeal should be dismissed: Blum v. Brownstone Bros., 50 Cal., 293; Estate of Callahan, 60 Cal., 232; Estate of Dean, 62 Cal., 613.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the appeal is dismissed.

No. 9,775.

FRIEND AND TERRY LUMBER CO. *v.* MILLER.

Department One. Filed September 24, 1885.

INTEREST HOW ALLEGED—NOT A SEPARATE CAUSE OF ACTION.—In an action for goods sold and delivered, interest on the principal debt due does not constitute a separate cause of action. And the simple statement, in concise language, that a given sum is due for interest, does not render the complaint ambiguous, unintelligible or uncertain, in any respect.

BREACH OF CONTRACT TO FURNISH MATERIALS—MEASURE OF DAMAGES.—Plaintiff contracted to deliver to the defendant, certain piles to be used in fulfillment of a contract between the latter and the drainage commissioners. Plaintiff had knowledge of the use for which the piles were intended. In an action to recover for the value of such piles, *held*, that the defendant was not entitled to show, that by reason of the delay of plaintiff in furnishing the piles, he was prevented from completing his contract for so long a time, that he did not realize the money therefor, which, but for such delay, he would have received from the state, through the drainage commissioners.

THE SAME—PROXIMATE AND REMOTE CAUSE.—The failure of plaintiff to deliver the piles in time was a *remote* not a *proximate* cause of defendant's failure to receive compensation on his contract. Such loss was not one "which, in the ordinary course of things, would be likely to result" from a failure to deliver under the contract.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Grove L. Johnson, for the appellant.

Young, Young & Dunn, for the respondent.

SEARLS, C. Action to recover one thousand eight hundred and seven dollars and forty cents for lumber, building material and piles, sold and delivered by plaintiff to defendant.

Plaintiff had a verdict for one thousand and eighty-seven dollars and ninety cents, upon which judgment was entered. The appeal is taken from the judgment and from an order denying a motion for new trial.

Defendant interposed a demurrer to the complaint, which was overruled. The demurrer was properly overruled. The pleading, after averring the indebtedness of defendant in the sum of

one thousand five hundred and seventy-eight dollars and ninety-seven cents, on account of certain lumber, building material, etc., sold and delivered to defendant by plaintiff, between October, 1880, and August, 1882, proceeds to aver that defendant is further indebted in the sum of two hundred and twenty-eight dollars and forty-three cents, on account of interest to August 1, 1882, due on said sum. The interest was but an incident of the principal thing, the debt due to plaintiff; it did not constitute, and was not treated in the complaint as forming a separate cause of action. The simple statement, in concise language, that a given sum was due for interest up to a given date on the principal sum, did not render the complaint ambiguous, unintelligible and uncertain in any respect.

At the trial, defendant introduced testimony tending to show that he contracted with plaintiff for certain piles and lumber, to be used in pursuance of a contract with the drainage commissioners, which he had agreed to finish within a given time, all of which was known to plaintiff, who agreed to furnish the same when required. Defendant then offered to prove that plaintiff failed to furnish the piles in time, whereby he was delayed in the completion of his contract, and failed to realize the money therefor, which, but for such delay, he would have received from the state through the drainage commission. The testimony was offered in various forms, but all tending to the same end, viz., to show that, by the delay of plaintiff, defendant was prevented from completing his contract for so long a time that he did not receive his pay from the state, was compelled to borrow money to carry on the "work that the piles were to be used in," etc.

It was objected to this evidence, that it was irrelevant, immaterial and incompetent; that the damages sought to be proven were too remote; that the act under which defendant was acting was invalid, etc.

The objection was sustained, and the action of the court is assigned as error.

The damages sought to be proven were not the proximate result of plaintiff's violation of its contract.

Section 3,300 of the civil code provides that "for the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

Rules prescribing the measure of damages, based upon such principles of justice and equity as shall be uniform, definite and exact, are not readily formulated.

We know of no branch of the law in which greater conflicts and contradictions exist than are to be found in the adjudicated cases on this subject.

The most that has been, or that can be, done is to formulate such arbitrary rules as, the subject to which they are applied considered, will in the great majority of cases afford such measure of indemnity as the ends of justice will warrant.

Complete indemnity, in its broadest sense, cannot and ought not in all cases to be obtained. To illustrate, the measure of damages on a breach of an ordinary contract for the payment of money is the amount agreed to be paid, with interest.

It will frequently occur that the payment of principal and interest may fall far short of indemnity. The creditor, from the want of money, may have suffered in his credit, or become bankrupt and lost his fortune. Complete indemnity would require compensation for all such losses. But to adopt and enforce such a rule would tend to drive all but the reckless and impecunious from all business transactions involving monetary obligations.

For reasons which, on reflection, become very apparent, the measure of damages for the "breach of a contract," as it is usually termed, is confined to the amount which will, in the language of the code above quoted, "compensate the party aggrieved for all detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

The wisdom of the doctrine as contained in this provision of the code has been recognized by most writers upon the subject of damages. Field, in his work on Damages, section 10, says: "To trace remote effects of causes would often be a difficult, if not impossible, task. It would require an infinite mind. Each cause produces results that, in turn, alone or by combination with other causes, produces other effects, and so *ad infinitum*. It is a subject too abstruse and complicated for the human mind."

The damages must be proximately caused thereby; that is, such as next immediately follow and are produced by the act complained of; or, if not thus proximate, such as in the ordinary course of things would be likely to result therefrom. The case of Smead v. Foard, cited at section 254, Field on Damages, illustrates clearly the doctrine we are considering, and the distinction between proximate and remote damages. The defendant had contracted to deliver a threshing machine to a farmer within three weeks, knowing it was needed to thresh wheat in the field, but did not deliver it at the time agreed, and after reasonable efforts to secure the crop the plaintiff's wheat was injured by the necessary delay in saving the crop, and in consequence of a rain, and he sustained a further damage from a fall in the market price, which occurred before it could be kiln-dried and got ready for sale. He was held entitled to recover the loss by the injury to the wheat, but not to the change in the market, as the former loss might well have been in the contemplation of the parties, but not the latter. The doctrine of that case illustrates what should be the rule here. Defendant here contracted for piles to be used in fulfillment of a contract with the drainage commissioners, of all of which plaintiff was aware. By the delay of the latter in delivering the

piles, defendant suffered loss, was compelled to pay for the use of a piledriver, lost his time and sustained other expenses, which he proved, and as the verdict was for less by seven hundred dollars than the amount claimed and proved by plaintiff, we may reasonably infer defendant was allowed a deduction on account of the damages thus sustained. He sought, but was prevented from proving, the loss he sustained by failure to collect the money due from the state.

The failure of plaintiff to deliver the piles in time was a remote, not a proximate cause of defendant's failure to receive compensation on his contract. It is said the drainage act, under which defendant was a contractor, was declared unconstitutional. Whether defendant failed from this cause or because the fund from which he was to be paid was exhaused, or from any other like cause, to receive payment from the state, seems to us unimportant. This is not a loss "which in the ordinary course of things would be likely to result" from a failure to deliver under the contract. It was damages which could not well have been contemplated by the parties when they entered into the contract. The failure of defendant to secure compensation from the state was a result brought about by the interposition of the other agencies—dependent upon independent causes, over which plaintiff and defendant had no control, and could not have contemplated. It was a loss which, like the change of the market price of wheat mentioned in Smead v. Foard, *supra*, was too remote to have been contemplated.

We are of opinion the judgment of the court below, and the order denying the motion for a new trial, should be affirmed.

FOOTE, C., and BELCHER, C. C. concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 9,843.

GIRDNER ET AL. v. BESWICK.

Department One. Filed September 24, 1885.

NEW TRIAL—NOTICE OF, WAIVES NOTICE OF DECISION.—Notice of the decision is presumed to have been waived, if the beaten party files and serves a notice of intention to move for a new trial.

NOTICE OF NEW TRIAL MUST BE FILED IN TIME.—A notice of intention to move for a new trial is unavailing, if not filed within the time limited by section 659 of the code of civil procedure.

APPEAL from an order of the superior court of Siskiyou county, denying the defendant's motion for a new trial. The opinion states the facts.

W. I. Nichols and *H. B. Warren*, for the appellant.

Wm. McConaughy and *J. V. Brown*, for the respondents.

FOOTE, C. The plaintiffs recovered judgment in the court below for two thousand dollars, damages for breach of contract.

The defendant's counsel, in their brief, contend that proper notice of an appeal was given from the judgment of the court below, as well as from its order denying a new trial.

We do not so understand that notice, and are of opinion that, by no fair interpretation, can it be held to include notice of appeal from anything except the order made by that tribunal overruling and denying defendant's motion for a new trial. And the sole question now to be considered by this court is, whether or not there exists any merit in the appeal from that order.

There were two notices of intention to move for a new trial. The first one, in point of time, was duly and legally filed and served.

From the filing and service of that notice, the defendant is presumed to have waived that of the decision in the cause: Cottle v. Leitch, 43 Cal., 322.

With the exception of serving, settling, filing and certifying of a statement, no further action on that motion for new trial was had in the court below. It would serve no useful purpose to declare what effect, even if it be considered as pending and undecided, the first has upon the second motion for a new trial, for the reason that the notice of intention for the latter was not filed until the sixteenth of August, 1884, too late to meet the statutory requirement of section 659, code of civil procedure, the decision in the case having been made and filed on the seventh of March preceding: Hook v. Hall, 6 West Coast Rep., 134.

The order appealed from should, therefor, be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the order is affirmed.

No. 11,011.

INGLIS *v.* SHEPHERD.

Department One. Filed September 24, 1885.

ELECTION CONTEST—MISTAKEN DESCRIPTION IN BALLOTS.—A candidate for the office of supervisor for the *first* district of a county, is entitled to have counted for him ballots which, on their face, showed that he was voted for as supervisor for the *second* district, when it appears, from all the circumstances of the case, that such ballots were intended for him.

APPEAL from a judgment of the superior court of San Joaquin county, entered in favor of the plaintiff. The opinion states the facts.

J. H. & J. E. Budd, for the appellant.

Campbell & Hosmer and *Smith & Keniston*, for the respondent.

FOOTE, C. Wm. Inglis contested D. C. Shepherd's election as supervisor for the first district of San Joaquin county.

The court below gave judgment in favor of the contestant, and respondent appeals therefrom.

The question determining the contention was this: Was, or not, Inglis entitled to have counted for him, as supervisor for the *first* district of San Joaquin county, sixty-seven ballots which on their face showed that he was voted for as supervisor for the *second* district of said county? The evidence admitted by the court, and which, under the circumstances of this case, is permissible, was that at the time no other person named William Inglis, except the contestant and his minor son, resided in said county; that contestant was the only person of that name running as a candidate for the office of supervisor of said first district; and that he lived in said district, and that he was the only candidate of his party therein for said office. The board of election all knew those facts. His name, together with the name of the office and the number of the district, were properly printed on the great majority of the ballots voted for him, as issued by the printer employed by his party managers to attend to the matter. By some mistake of that printer, the figure 2 became substituted for the figure 1 on said sixty-seven ballots and others placed on tables convenient for the use of voters. Some time during the day of election this mistake was discovered, and, as far as possible, the misleading ballots were destroyed. Before this mistake was discovered, those sixty-seven ballots were voted, at the proper precinct of the district in which contestant was such candidate. And nearly half of them were counted for him by the proper election board, but they refused to count for him some thirty-six of them. Those sixty-seven ballots, with one or two exceptions, were what are called "straight tickets."

Thus, it appears that the voters casting the disputed ballots intended to vote for William Inglis for supervisor of the first district of said county, and no fault resting on them, we do not perceive the propriety of permitting the carelessness or mistake of a printer to defeat that intention.

The judgment of the court below should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

No. 9,754.

HARRIS, ADMINISTRATOR, v. HARRIS.

Department One. Filed September 24, 1885.

CANCELLATION OF DEED—STATEMENTS OF DECEDENT AS TO CONSIDERATION OF DEED—EVIDENCE.—In an action to cancel a deed, made by a son, just preceding his death, to his father, and to quiet the title of the son's estate, to the lands purporting to be by that deed conveyed, in which an issue arises, whether or not the son acquired the land by a previous conveyance from his father, without consideration, and as a trustee for the latter, to reconvey them when requested by him so to do, evidence of statements made by the son, as to the nature of the transaction and to the consideration therefor, is admissible.

APPEAL from an order of the superior court of Lassen county, denying the defendant's motion for a new trial. The opinion states the facts.

C. G. Kelley, *M. Marsteller* and *Hart & White*, for the appellant.

C. McClaskey and *E. V. Spencer*, for the respondent.

FOOTE, C. An appeal from an order refusing the defendant a new trial. The respondent objects to the consideration by this court of the statement on that motion which is incorporated in the transcript. We can see no force in this objection.

This was an action to cancel a deed made by a son just preceding his death to his father, and to quiet the title of the son's estate, to the lands purporting to be by that deed conveyed.

It was an issue in the case, whether or not the son had acquired these lands by a previous conveyance, from his father, without consideration, and as a trustee for the latter, to reconvey them when requested by him so to do. As bearing upon this, the plaintiff introduced in evidence two bills of sale, of a band of horses, the first from the father to the son, the second from the son back to the father.

It also appeared, from the plaintiff's evidence, that the bills of sale were contemporaneous with the deeds of conveyance; that is, the father's deed to the son was made in connection with the first, and the son's deed in connection with the second bill of sale, and that the transfers of the lands and horses, by both father and son were, in point of time and other material ways, respectively, so blended together as to be, substantially, parts of one transaction, where the surrounding circumstances and statements of the parties at these respective times, became pertinent in their entirety.

A motion was made by the plaintiff's counsel to strike out certain parts of A. A. Smith's testimony relative to statements made by James H. Harris as to the consideration of the first bill of sale, and objection was also made by him to certain questions on this same subject, propounded by defendant's counsel to Smith.

This motion to strike out, as also the objections to the questions, were sustained by the court, and excepted to by the defendant, and are assigned as errors in his eleventh, twelfth, thirteenth and fourteenth specifications thereof.

Under the issues above stated, and the evidence as then before the court, a full and fair investigation of the matter was proper, and to that end all of the evidence given by and offered from Smith was pertinent, and the court erred in striking out any part thereof, and in not permitting him to make responsive answers to the questions specified, in their entirety; and it should have considered such answers in rendering judgment in the case. It was proposed to impeach the witness McKissick by the evidence offered by the witness Mrs. Shinn.

That evidence should have been admitted. The foundation for it was sufficienty laid, and the questions asked and proposed to be

asked Mrs. Shinn, with the above-mentioned object in view, were proper.

The order of the court below should be reversed and the cause remanded for a new trial.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the order is reversed and the cause remanded for a new trial.

No. 9,963.

SHUMWAY v. LEAKEY.

Department One. Filed September 24, 1885.

MARRIED WOMAN—ACTION FOR SEPARATE PROPERTY—COVERTURE NEED NOT BE ALLEGED.—In an action by a married woman to recover her separate property, it is not necessary for her to aver coverture in her complaint; and, if such fact appears on the trial, it is competent for her to show, that the demanded property came to her as a gift, and was her separate property.

THE SAME—COMPLAINT SHOWING COVERTURE—ESSENTIAL ALLEGATIONS.—If the complaint shows the plaintiff to be a married woman, it is necessary for her to state such other facts as are necessary to entitle her to maintain the action.

THE SAME—SCHEDULE OF SEPARATE PROPERTY—EVIDENCE OF WIFE'S TITLE.—In such action, the schedule of plaintiff's separate property, filed and recorded in the office of the county recorder, is *prima facie* evidence of her title, under sections 165 and 166, of the civil code, and is admissible in evidence to show the same.

ASSESSMENT ROLL WHEN NOT ADMISSIBLE TO SHOW TITLE OUT OF PLAINTIFF.—An assessment roll, in which the property demanded is assessed to plaintiff's husband, is not admissible in evidence to show title out of the plaintiff, unless proof is made, or offered, that the plaintiff gave in the property as that of her husband, or that she had knowledge that it was so assessed.

THE LAWS OF A FOREIGN STATE ARE TO BE PROVEN like any other facts.

PROPERTY ACQUIRED IN FOREIGN STATE—TENURE OF TITLE—PRESUMPTION AS TO FOREIGN LAWS.—The tenure by which personal property acquired in another state, and brought here, is held, as between husband and wife, will depend upon the laws of the state where acquired. But, in the absence of any proof as to the laws of such other state, they will be presumed to be the same as the laws of California.

APPEAL from a judgment of the superior court of Lassen county, entered in favor of the plaintiff. The opinion states the facts.

E. V. Spencer, for the appellant.

A. L. Shinn, and *J. D. Goodwin*, for the respondent.

SEARLS, C. The plaintiff, a married woman, brought this action to recover, as her separate property, certain personal property from the defendant, who, as sheriff of the county of Lassen, had levied upon and taken the same under a writ of attachment against plaintiff's husband, and as the property of the latter.

Plaintiff had verdict and judgment. Defendant appeals.

It was not necessary for plaintiff to aver coverture in her complaint, and when that fact appeared at the trial, it was competent for her to show that the demanded property came to her as a gift and was her separate property.

Had her complaint shown her to be a married woman, it would have been incumbent upon her to state such other facts as were

necessary to entitle her, as such, to maintain the action: Thomas v. Desmond, 63 Cal., 426.

In Peters v. Fowler, 41 Barbour, New York, 467, it was held that in that state (New York) "the fact of coverture has ceased to have any relation to the technical right of maintaining an action by a married woman in respect to her separate property, and the allegation of coverture in the complaint is no longer necessary."

The schedule of plaintiff's separate property, recorded in the office of the county recorder November 13, 1877, was properly admitted in evidence.

The civil code, sections 165 and 166, provides for filing and recording the separate personal property of the wife, and "the filing of the inventory in the recorder's office is notice and *prima facie* evidence of the title of the wife."

The cattle described in the schedule are of the same general kind as a portion of that seized by the sheriff, and whether in fact the identical property so seized was a question to be determined by evidence *aliunde*.

Defendant offered in evidence the assessment roll of Lassen county for the years 1882 and 1883, for the purpose of showing that no separate property had been assessed to plaintiff, and also to show that part of the property described in the complaint was assessed to B. F. Shumway, the husband of plaintiff, as his own property, and not as the property of his wife, the plaintiff.

Plaintiff objected, on the ground that such evidence was immaterial and incompetent. The objection was sustained and the ruling is assigned as error.

In Arnold v. Skaggs, 35 Cal., 684, an assessment roll was held competent as evidence. The question was, whether defendant Skaggs, or one Ingalls, owned certain personal property, and the evidence showed that Ingalls gave it in to the assessor as the property of Skaggs; that the latter appeared before the board of equalization for the purpose of procuring a reduction of the amount of the assessment. Under these circumstances the assessment roll was held competent to prove property in Skaggs.

The present case differs materially from that. Here there was no proof, or offer to prove, that plaintiff gave in the property as that of her husband, or that she had knowledge that any part of it was so assessed. Under such circumstances the assessment roll was not competent evidence to prove property out of her and in her husband: Chamberlain v. Vance, 51 Cal., 75.

The refusal of the court to give the third and fourth instructions asked by defendant is assigned as error.

These instructions were to the effect: First—That the laws of another state can only be shown to the jury by offering them in evidence, as other facts are proven.

Second—That if the property claimed by plaintiff was by her received as a gift in another state, then it was her separate property, or community property, as provided by the laws of the state where

the gift was made, and if brought to this state, it would be held here by the same title which she had to it in such other state, and before plaintiff can hold the same here as her separate property, she must show that it was her separate property when brought here. The evidence tended to show that certain cows were presented as a gift to plaintiff in 1863 in the territory of Nevada; that in 1866 she sold a portion of the increase of such cows, and brought the residue to this state, and that the demanded property has been mainly purchased with the proceeds of sales of such cows and their increase, which increase has amounted to a band or herd of many hundred cattle.

The record shows affirmatively that no evidence was introduced tending to show what the laws of Nevada were in 1863 concerning the separate property of married women.

It is true that the laws of a foreign state are to be proven like any other fact. It is equally true that the tenure by which personal property, acquired in another state and brought here, is held, as between husband and wife, will depend upon the laws of the state where acquired: Kreamer v. Kreamer, 52 Cal., 302. It is, nevertheless, true that in the absence of any proof as to the laws of another state, they will be presumed to be the same as our own: Marsters v. Lash, 61 Cal., 622; Morris v. Harris, 15 Cal., 126.

It follows that, as under our law, property acquired by the wife during coverture, by gift, is her separate property, and that we must presume the laws of Nevada to be the same as our own, and there being no testimony to give point to the instructions asked, they were inapplicable, admitting them to be correct as abstract propositions at law.

We are of opinion that judgment of the court below should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

No. 9,907.

SIMPSON v. APPLEGATE.

Department Two Filed September 24, 1885.

EJECTMENT—TENANCY AT WILL AS DEFENSE—CONFLICT OF EVIDENCE—NONSUIT.—In an action of ejectment, tried before a jury, where the evidence is conflicting as to whether the defendant was or was not a tenant at will of the plaintiff, the court cannot grant a nonsuit on the ground that the evidence established such fact.

APPEAL from a judgment of the superior court of Placer county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

C. A. & F. P. Tuttle, for the appellant.

Hale & Craig, for the respondent.

FOOTE, C. A suit in ejectment for certain lands. The defense set up was an equitable title of the defendant in possession.

A jury was empaneled to try the issues of fact in the case.

The plaintiff and defendant, respectively, introduced their evidence, and then the defendant moved for a nonsuit, which was granted by the court, and from its judgment and an order denying a new trial the plaintiff appealed.

The ground upon which the court rendered its judgment was that by the evidence a tenancy at will was shown in the defendant, and no notice had been given him under section 789 of the civil code.

There appears to have been a conflict of testimony as to whether the defendant was, or not, such tenant, which question should have been submitted to the jury under proper instructions.

For this reason the judgment and order of the court below should be reversed, and the cause remanded for a new trial.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed and the cause remanded for a new trial.

No. 9,768.

QUINN *v.* WINDMILLER.

Department One. Filed September 24, 1885.

UNITED STATES SYSTEM OF SURVEYS—AREA OF QUARTER SECTION—JUDICIAL NOTICE TAKEN OF.—Courts will take judicial notice that, under the system adopted by the United States for surveying and marking out its public lands, a quarter section is intended to be just forty chains square; and whenever a claim is made that a quarter section contains a greater area, affirmative proof must be produced that the lines were so run upon the ground as to include that greater area.

DIVISION FENCE—ADJOINING PROPRIETORS—PRESCRIPTION—ESTOPPEL.—Adjoining owners of land, who erect a division fence along their supposed boundary line, under an agreement that, upon the discovery of the true boundary, the fence shall be changed so as to comply therewith, acquire no rights as against each other, by reason of the erection of such fence, either by prescription or estoppel, until the true boundary has been determined.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

Freeman & Bates, for the appellant.

A. P. Catlin, for the respondent.

BELCHER, C. C. The plaintiff and defendant own lands which adjoin on two sides—a mile on one side and a half mile on the other. In 1872 or 1873, the plaintiff's grantor and the defendant constructed a fence to divide their lands. This fence remained where it was placed till May, 1883, when the defendant, claiming it was on his land and not on the true lines between them, removed a portion and asked the plaintiff to remove the balance of it.

This action was then commenced by the plaintiff to quiet his title up to the lines of the fence as it stood before any of it was removed.

The case was tried and judgment was rendered in favor of the defendant, from which and from an order denying a new trial the appeal is taken.

In his complaint the plaintiff describes the land to which he claims title as commencing at the center of a certain section seven, and running thence north forty-three chains to a fence as it stood in the fall of 1882; thence west along the fence eighty-three chains to a fence; thence south along the fence sixty-three chains; thence east eighty-three chains, and thence north twenty chains, to the place of beginning.

In making their proofs, both parties showed title from the United States, and their lands were described by legal subdivisions. The plaintiff did not attempt to show that the fence to which he claimed on the north and west was built upon the lines of the quarter sections as surveyed, but he insists that the court cannot know, judicially, that it was not so built, and that, at any rate, the plaintiff has title by prescription to the surplus, and that the defendant must be held estopped from denying that the fence was built upon the true lines.

We think the court does know, judicially, that, under the system adopted by the United States for surveying and marking out its public lands, a quarter section is intended to be just forty chains square, and that whenever a claim is made that a quarter section contains a greater area, affirmative proof must be produced that the lines were so run upon the ground as to include that greater area. Here, in the absence of such proof, the court was justified in saying that the north line of section seven was only forty, and not forty-three, chains north of its center.

Upon the questions of prescription and estoppel, it is claimed for the appellant that the fences were built by the owners of the lands in 1872 or 1873, upon agreed lines, and that the plaintiff's grantor occupied to those lines for about ten years, claiming title, and he thereby acquired title by prescription; that the defendant acquiesced in the lines as fenced, for the same length of time and thereby became estopped from denying that they were the true lines.

Speaking of the building of the fences, defendant testified: "Neither Tapper, plaintiff's grantor, nor I, knew where the lines were; we hunted around to find the lines; Tapper claimed that the line was where the fences were placed; we agreed that when we ascertained where the lines were, we would put the fences upon the lines; the Pearson line varied six or eight feet from the Prentiss line; it was further south; I always claimed to the true line; the fences were not straight; there was a 'jog' of eight feet in one place, where the part that Tapper built joined with the part that I built; the fences were not parallel with the true line; they did not run east and west, nor north and south."

The statement further shows that, "it appeared that the fences on the north side of plaintiff's land diverged all the way from one foot to twenty-two feet from an east and west line; and the fences

on the west side diverged from one to eighteen feet from a north and south line."

Tapper was called as a witness for the plaintiff, and denied that anything was said between him and the defendant about changing the lines of the fences if they should afterward ascertain that they were not correct; but the court below evidently believed the defendant, as it found in his favor on every point.

Assuming the defendant's testimony to be true, it is clear, we think, that Tapper, if he had commenced this action, could not have maintained it, either upon the ground of prescription or of estoppel, and we fail to see how the plaintiff can do what Tapper could not: Irvine v. Adler, 44 Cal., 559.

When the plaintiff purchased, the deed which he received described the land by government quarter sections, and this remained so until the day before this action was commenced, when he took a new deed conveying to him all the land which was in his grantor's possession prior to the date of the first deed. But when this deed was received a part of the fence had been removed and the plaintiff knew of defendant's claim. Counsel for appellant cite in support of their views: Sneed v. Osborne, 25 Cal., 626; Columbet v. Pacheco, 48 Cal., 397; Moyle v. Connelly, 50 Cal., 295; Biggins v. Champlia, 59 Cal., 113; Cooper v. Vierra, 50 Cal., 282; and Johnson v. Brown, 63 Cal., 39; but none of these cases are in point here. They hold, as was said in Johnson v. Brown, that "where owners of adjacent parcels of land have occupied, adversely to each other for more than five years, their respective tracts by a division line, which each has recognized and acquiesced in as the true line during all of that time, either is estopped from afterward questioning it as the true line." But here, as the court finds, "The line of said fences was never settled and agreed upon by defendant and plaintiff or his grantors, as the true and correct boundary line of their respective tracts of land." It is not necessary to notice the other points.

We think the judgment and order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 9,924.

REYNOLDS v. SNOW.

Department Two. Filed September 25, 1885.

ELECTION—FORM OF BALLOT—SIZE MUST CORRESPOND TO STATUTORY REQUIREMENTS.—A ballot which does not conform to the requirements of section 1,191 of the political code, as to length, and in other minor respects, cannot be counted.

FINDINGS—CONFLICT OF EVIDENCE—DOCUMENTARY EVIDENCE—REVIEW OF ON APPEAL.—The reason why a court of appeals declines, ordinarily, to interfere upon a conflict of evidence, is because the trial court has an advantage over the former, in that it can both hear the witness and observe his deportment, when before it and delivering his testimony. When, however, the findings of the trial court are entirely based upon documentary evidence, such as ballots cast at an election, photographic copies of which are before the appellate court, the reason of the rule fails, and with it the rule itself.

THE FINDING THAT CERTAIN BALLOTS WERE NOT INTENDED TO BE CAST for the appellant, reviewed, and *held*, from an inspection of photographic copies thereof, not sustained by the evidence.

APPEAL from a judgment of the superior court of Stanislaus county, entered in favor of the plaintiff. The opinion states the facts.

Schell & Bond, for the appellant.

Wright & Hazen, for the respondent.

FOOTE, C. A contest for the office of supervisor of district number one of Stanislaus county.

The bill of exceptions in the transcript should be considered by this court; the objections made to it by the respondent are not well taken. It appears by the official returns of the various election boards of the district, as canvassed by the board of supervisors of the county, that the appellant, William Snow, received three hundred and twenty-four, and the respondent, B. F. Reynolds, three hundred and twenty-three, votes. To the former the board awarded the certificate of election and the office in dispute. The latter contested his right thereto, and prevailed in the contest. From that judgment Snow appealed. The court, upon a recount of the ballots, discovered that the contestant's exhibit number eight was one having the name of William Snow printed on it, and that of the office for which he was a candidate, but the paper on which it was printed was, when voted, only about eight and one-half inches in length, and did not, in that and some other minor respects, conform to section 1,191 of the political code, and ought not to be counted for Snow, as it had been. This conclusion of the court was correct.

That tribunal substantially found, also, that an election board had counted for Snow two ballots called plaintiff's exhibits two and three; that on them, and in the same line, were printed the following words and figures, viz.: "23. Supervisor District No. 1, B. F. Reynolds." That the words "Supervisor District No. 1, B. F. Reynolds," had been distinctly and completely erased by several lead pencil marks being drawn completely through said words, and each of them, and that upon one of said ballots had been written the words "Wm. Snow," and upon the other the word "Snow," and that these words were written opposite said figures 23, line and erasure.

That the words erased were still discernible and distinguishable, and that the voter intended by the erasure to strike from the ballots, and each of them, the name of the office of supervisor of said county, in and for said district, and that no such office remained designated upon said ballots, and that neither the board of election nor the court could ascertain that the voters intended to vote for said "Snow," and "Wm. Snow," respectively, for said office, and that it was not the intention of said voters to vote for any person for said office.

To this finding, upon a thorough inspection of those ballots, we cannot agree. In a case where there was a conflict in the evidence, in the sense that witnesses in the presence of the court had sworn contrary to each other, as to facts, we should not feel warranted in entering our dissent; but where, as in this case, the ballots themselves, were, on that point, the only evidence before the court, and as photographic copies of them are before us, it is clear that there was no such conflict in the evidence as should prevent us from exercising a judgment contrary to that of the learned judge below. The reason why a court of appeal declines, ordinarily, to interfere upon a conflict of evidence, is because the trial court has an advantage over the former, in that it can both hear the witness and observe his deportment when before it, and delivering his testimony.

In the present instance the reason fails, and with it the rule of action.

The persons writing "Snow," and "Wm. Snow," on exhibits two and three, intended to vote for William Snow for superviser of district No. 1, Stanislaus county, and the board of election were right when they counted those ballots for him for said office. It became plain from an inspection of another of the ballots, by the court, that the board of election had erroneously counted for Reynolds one ballot, which was on its face unmistakably cast for Snow, and thereupon it was properly counted for Snow. The action of that tribunal, in taking from Snow a vote, upon evidence showing that Jarvis Whitehead, not being a legal voter, had voted for him in supervisor district No. 1, Stanislaus county, will not be reviewed, as the evidence was conflicting, in the proper sense of that term.

The court found further, that B. F. Reynolds received for the office in dispute three hundred and twenty-two, and William Snow three hundred and twenty-one, legal votes.

From the foregoing, it appears that the finding should have been that B. F. Reynolds received three hundred and twenty-two, and Wm. Snow three hundred and twenty-three votes for the same.

The judgment should be reversed and cause remanded.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded.

No. 9,910.

REED v. DRAIS.

Department Two. Filed September 25, 1885.

DEMURRER—MUST GO TO WHOLE CAUSE OF ACTION.—A demurrer cannot be interposed to a part of a cause of action or defense. If irrelevant, or immaterial, a motion to strike out may be interposed; but a demurrer, to avail anything, must go to the whole cause of action or defense.

EVIDENCE—REJECTION OF—MATERIALITY MUST BE SHOWN.—In the absence of a showing as to the materiality of testimony sought to be introduced in reference to the value of the property in dispute, in an action to quiet title, the rejection of such testimony is not error.

EVIDENCE OF VALUE—EXPERT TESTIMONY—FOUNDATION FOR.—A witness called upon to give an opinion on the subject of value, whether offered as an expert, or not, must lay a proper foundation for the introduction of his opinion, by showing he possesses the means to form an intelligent opinion, derived from an adequate knowledge of the nature and kind of property in controversy, and of its value.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.—A new trial, on the ground of newly discovered evidence, will not be granted, if such evidence be merely cumulative.

APPEAL from a judgment from the superior court of Stanislaus county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

Byers & Elliott, for the appellant.

Campbell & Muenter and *W. E. Turner*, for the respondent.

SEARLS, C. This is an action by Miriam P. Reed, an infant, by her guardian *ad litem*, W. K. Reed, to quiet title to certain land. Plaintiff claims that the land in controversy was conveyed to her by a sister.

That the grantor, before the deed was recorded, went to the office of the county recorder and took the deed therefrom, and sold and conveyed the same land to defendant, and that defendant had notice of such previous conveyance, at the date of the sale and conveyance to him. Defendant denied all notice of a previous conveyance by his grantor and denied plaintiff's title.

The cause was tried by the court, findings waived, and judgment entered for defendant.

Plaintiff moved for a new trial, which was denied, and this appeal is prosecuted from the judgment and order denying a new trial.

The demurrer to a portion of the amendments to defendant's answer was properly overruled. A demurrer cannot be interposed to a part of a cause of action or defense. If irrelevant, or immaterial, a motion to strike out may be interposed, but a demurrer, to avail anything, must go to the whole cause of action or defense. In the absence of a showing as to the materiality of the testimony sought to be introduced in reference to the value of the land, we cannot say the plaintiff was injured by the refusal of the court to permit W. K. Reed and E. Olmstead to testify as to such value.

Conceding that the testimony may have been admissible, the witnesses offered, failed to show themselves possessed of the requisite knowledge to authorize them to testify as to the value of the land.

"Where a witness is produced to testify in the character of an expert as to the value of property, it should appear that he has some

special skill or experience, or peculiar knowledge of the value of the class of property about which it is proposed to question him, such skill or knowledge having been acquired by him in the line of his profession or business:" Rogers on Expert Testimony, sec. 154.

According to Wharton on Evidence, section 447, two essentials are requisite to a proper estimate of value.

"First—A knowledge of the intrinsic properties of the thing.

"Secondly—A knowledge of the state of the market.

"As to such intrinsic properties as are occult and out of the range of common observers, experts are required to testify. As to the properties which are cognizable by an observer of ordinary business sagacity, being familiar with the thing, such an observer is permitted to testify."

A witness called upon to give an opinion on the subject of value, whether offered as an expert or not, must lay a proper foundation for the introduction of his opinion, by showing he possesses the means to form an intelligent opinion, "derived from an adequate knowledge of the nature and kind of property in controversy, and of its value."

We may assume the residence of the witnesses in the vicinity of the property in question, and their pursuits, to have given them a reasonable opportunity to become acquainted with the nature and kind of land in dispute, but it does not follow, and their testimony does not show them to possess any such knowledge as to its value, as to warrant them to give an opinion on that subject: Whitney v. City of Boston, 98 Mass., 315; Terpenning v. Com. Ex., 43 N. Y., 279; Clark v. Rockland, 52 Me., 68; Haight v. Kimback, 51 Iowa, 13.

There is no doubt that a witness acquainted with the value of property may give an opinion as to such value, but he must first be shown to possess the requisite knowledge, and then, although such knowledge is not the result of any peculiar skill in a particular pursuit or branch of business, or department of science, he may yet be heard.

Where, however, the knowledge is wanting, the opinion should be rejected.

We think, therefore, the court did not err in refusing to admit the testimony. The motion for a new trial, upon the ground of newly-discovered evidence, was properly denied. The newly-discovered evidence was, according to the affidavits, cumulative, and in such cases it is well settled a new trial should not for such cause be granted. Upon the whole case, as presented, we are of the opinion the judgment of the court below, and the order denying the motion for a new trial, should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 9,538.

GINOCCHIO v. AMADOR C. & M. CO., AND BRIGHT ET AL., INTERVENORS.

Department Two. Filed September 25, 1885.

ASSIGNMENT OF CHOSE IN ACTION—ASSIGNEE MAY SUE—AMOUNT OF RECOVERY.—If a chose in action is transferred by an assignment absolute in form, though as security only, for a debt less in amount than the sum due, or to become due, upon the instrument assigned, the assignee may sue thereon in his own name, and is not limited to recover only the sum due him from the assignor, but may recover the whole amount due thereon, being in turn responsible to his assignor for any excess.

THE SAME—INSTRUMENT SUED ON CONSTRUED.—The instrument in suit was an agreement between the defendant, and the Moore Mining Company, by the terms of which the defendant agreed to furnish water to the mining company for five years, to run a quartz mill, at a fixed price per inch, to be supplied through a ditch to be constructed by the mining company. The latter was to be paid the expense of building the ditch, by the defendant, in water, and in case working the quartz mill was abandoned before such payment was received the defendant was to pay the expense of building the ditch, in cash, from the net proceeds of water run through and sold from such ditch. The ditch was constructed and delivered to the defendant. Before the mining company had been paid, it abandoned working the quartz mill. *Held*, that the ditch was the property of the defendant, and not an appurtenant to the quartz mill; that the rights of the mining company, under the contract, were assignable, and had been properly assigned to the plaintiff.

APPEAL from a judgment of the superior court of Amador county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

James Wheeler and *Eagon & Armstrong*, for the appellant.

James F. Farley and *A. C. Adams*, for the respondent.

SEARLS, C. This is an action brought by Alfonso Ginocchio, as assignee, against the Amador Canal and Mining Company, upon an instrument in writing, to recover the sum of five thousand nine hundred and forty-two dollars and seventy-two cents, with interest, in which action Bright and Newman intervened.

The instrument in suit was an agreement dated December 31, 1878, between the Amador Canal and Mining Company, a corporation, and the Moore Mining Company, a mining copartnership, by the terms of which the Amador Company agreed to furnish water to the mining company for five years to run a quartz mill, at a fixed price per inch, to be supplied through a ditch to be constructed by the mining company. The latter was to be paid the expense of building the ditch, by the Amador Company, in water, and in case working the quartz mine was abandoned before such payment was received, the Amador Company was to pay the expense of building the ditch, in cash from the net proceeds of water run through and sold from such ditch. The ditch was constructed at an expense of seven thousand seven hundred and thirteen dollars and sixty-five cents, and delivered to the Amador Company on or about February 1, 1879. About March 25, 1879, the members of the mining company organized a corporation under the name of the Moore Mining Company, to which they delivered possession of their mill and quartz mine, and verbally assigned their interest in the water contract. The interest of the mining company in the mine seems to have been only that of the holders of a bond for the conveyance thereof. The corporation worked the mine and received water on the contract of

the mining company until September, 1879, when they abandoned operations, and on the second day of September, 1879, assigned the water contract to the plaintiff herein, and at the same date the mining copartnership by C. J. Garland, one of its members, assigned said water contract to plaintiff, of all of which the Amador Company had notice.

On the third of May, 1881, all of the copartners of the Moore Mining Company executed a further assignment of the water contract to plaintiff, and ratified and confirmed the act of C. J. Garland in the assignment of September 2, 1879. Defendant caused fifty dollars to be paid to plaintiff, on account of the contract, February 28, 1881.

It is conceded that defendant had received in net profits from the sale of water from the ditch in question, a sum sufficient to satisfy the balance due on the contract.

The intervenors, Bright and Newman, claimed under a mechanic's lien taken upon the mill and mine for work performed for the corporation, and hold a sheriff's deed, under which they claimed the water contract, or right, and ditch passed to them, as appurtenant to the mill and mine.

The court rendered judgment in favor of plaintiff as against defendant and the intervenors. The latter have not appealed.

The first point made by appellant is, that the fifth finding is not sustained by the evidence, and is against the evidence. This is the finding in which the court finds a verbal assignment of the water contract.

In our view of the case, it is quite immaterial whether the contract was or was not assigned by the mining company to the corporation. Both the mining company and the corporation assigned to the plaintiff, and if the rights under the contract did not vest in him under one of these assignments, they must have done so under the other. In this connection it is proper to say, the third point made by the appellant, that the assignment by the corporation to plaintiff was as security only, cannot be sustained.

By the order of the board of directors, the president of the corporation was authorized to sell, assign and transfer any and all property for the benefit of the creditors, to the best possible advantage, or, as he may see fit. He assigned the contract absolutely, and the witness Voorhees declares it was not done by way of security, but in payment of a claim of plaintiff against the corporation, amounting to three thousand four hundred dollars.

The assignment was in form sufficient to transfer title in the chose in action to plaintiff, and if their is in fact any contingent interest remaining in the corporation, it is the province of the latter, and not of defendant, to assert it.

If a chose in action is transferred by an assignment absolute in form, though as security only, for a debt less in amount than the sum due, or to become due, upon the instrument assigned, the assignee is not limited in an action upon such chose in action to recover only the sum due him from the assignor, but may recover the

whole amount thereon, being in turn responsible to his assignor for any excess.

The second point of appellant is not sustained by the evidence.

It certainly does not appear that on the first of September, 1879, or thereabouts, the corporation quit and abandoned work on the mine.

Subsequently thereto, Garland, its manager, did some work on his own account, and at his own risk, and by consent of the company, upon the mine, but, under the testimony, he could not have held the corporation responsible for the expense thereof, and it was not in any proper sense work of the corporation. The contract upon which the action was brought, both by its terms and its character, was assignable.

The ditch which was to be constructed by the mining company was to be paid for by the defendant. It was, according to the pleadings, delivered to the defendant when completed, and possession thereof has ever since been retained by such defendant. The water run through this ditch to the quartz mill was to belong to defendant after being used to run the machinery. In case work was abandoned at the mine, defendant was to pay for the construction of the ditch out of the proceeds of water sold therefrom.

These facts, taken together, seem to indicate that defendant owned the ditch, and that neither the structure nor the water to be run through it bore any such relation to the mill or mine as to make them, or either of them, an appurtenant thereto. "A thing to be appurtenant to another must be of a different and congruous nature, such as an easement of servitude, or some collateral incident belonging to, and for the benefit of, the land:" Story, J., 1 Sumner's R., 21; C. C., sec. 662. Here the ditch and the water which it conveyed were not the property of the owners of the mill or mine.

The water supply of a mill will ordinarily pass with a conveyance of the mill, but in order to do so, it must belong to the mill—must be the property of the owner thereof, and not of another. We may add that the question as to whether the water supply did or did not pass to the intervenors as an appurtenant of the mill, is one that cannot affect the defendants in the manner claimed by it.

The court below found that it *did not pass*, and rendered judgment against the intervenors, from which judgment they have not appealed. They are concluded by the action of the court from asserting any claim to the water under the contract in question. The motion for a nonsuit was properly denied.

The additional questions of law presented by the record cannot, we think, affect the result, and the judgment and order should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 9,820.

BOSTON TUNNEL COMPANY *v.* MCKENZIE ET AL.

Department Two. Filed September 25, 1885.

MOTION FOR NEW TRIAL MUST BE DIRECTED TO DECISION.—A motion for a new trial cannot be based on the ground of the insufficiency of the evidence to justify the judgment, nor on the ground that the judgment is against law. The motion should be directed at the decision, and not the judgment.

THE SAME—FORM OF SPECIFICATION OF GROUND.—A specification of ground for asking for a new trial, as follows: "Insufficiency of the evidence herein to support or justify the findings of the court," is sufficient in form, and directed to the decision, as required by section 657 code of civil procedure.

CORPORATION—AUTHORITY OF PLAINTIFF'S ATTORNEY CANNOT BE QUESTIONED BY DEFENDANT.—An action by a corporation, brought and prosecuted by an attorney, is presumed to have been instituted by the consent of the plaintiff; and until the attorney's want of authority to appear for his client is shown, the defendant will not be permitted to have the action dismissed by showing that the plaintiff does not desire to maintain it.

CORPORATIONS—COPY OF COPY OF ARTICLES OF INCORPORATION—EVIDENCE.—Under section 299 of the civil code, a certified copy of the certified copy of articles of incorporation, required to be filed with the county clerk, in order to enable a corporation to maintain certain actions, is not in any sense secondary evidence, but is equal, in all respects, with the original, as evidence.

OFFICIAL CHARACTER—PAROL EVIDENCE OF.—The fact that a witness was a *de facto* officer and stockholder in a corporation may be shown by parol.

A TAX SALE, FOR ANYTHING MORE THAN IS LAWFULLY CHARGEABLE, is a sale without jurisdiction, and void.

JURY TRIAL—WAIVED BY PROCEEDING TO TRIAL BEFORE COURT.—A jury trial is waived, if, on the day the cause was set for trial, the parties appeared, and the trial proceeded before the court, without objection, and without a jury having been demanded.

APPEAL from a judgment of the superior court of Tuolumne county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

F. D. Nicol, for the appellants.

Street & Street and *E. A. Rodgers*, for the respondent.

SEARLS, C. Ejectment to recover a mining claim. Plaintiff had judgment.

Plaintiff is a corporation. In 1877 the demanded property was assessed for the purpose of taxation, to the Boston Tunnel Company. The taxes under such assessment not having been paid, the mining claim was sold on the second day of March, 1878, by the tax collector, to John Reister, who received a certificate of sale, and in due time a tax deed of the premises, under which he entered into possession. Defendants hold under the title thus acquired.

Defendants appeal from the final judgment and from an order denying a motion for new trial.

Respondent objects to a consideration of the statement on motion for new trial, on the ground that the notice of motion was to the effect that appellants would ask the court to vacate the judgment herein, and as one of the grounds of the motion specified the "insufficiency of the evidence to justify the judgment, and that it is against law."

Objection was made at the proper time and in the court below, to the sufficiency of the specifications as a foundation for the motion. Martin v. Matfield, 49 Cal., 42, and Sawyer v. Sargent, 2 West Coast Reporter, 900, are relied upon to sustain the objection.

In the case first above cited it was said: "Insufficiency of the evidence to justify the judgment is not a ground of motion for a new trial. Such a motion is not directed at the judgment, but at the verdict, or other decision of fact, for a new trial is a re-examination of an issue of fact: Code of civil procedure, sec. 656. That a judgment is against law is not ground for a motion for a new trial.

In Sawyer v. Sargent, it was held that a motion for new trial cannot be based on the ground of the insufficiency of the evidence to justify the judgment, nor can it, says the court, be based on the ground that the judgment is against law. The motion should be directed at the decision, and not the judgment.

It follows that in the present case the motion, so far as it is urged against the judgment, is irregular.

We find, however, that the fourth specification in appellants' causes, for asking for a new trial, is as follows: "Insufficiency of the evidence herein to support or justify the findings of the court."

This specification is sufficient in form and is directed to the decision as required by section 657, code of civil procedure.

The answer of defendants, after denying plaintiff's ownership and right to possession of the demanded premises, and setting up title in themselves, proceeds to set out that the action is not prosecuted by the consent of the Boston Tunnel Company, a corporation; that it is not the wish of the company that the action should be maintained; that by order of the trustees of said Boston Tunnel Company, a motion was made for the dismissal of the action; than L. Pierce, is not, and for many years has not been, the secretary of the plaintiff; that the complaint is not verified by any officer of the corporation, and other allegations of like import, all of which were, on motion, stricken out by the court, and this action is assigned as error. The complaint is signed and the action prosecuted by Street & Street and Edwin A. Rogers as the attorneys for the plaintiff. Their right to institute an action and to conduct the same to a determination in the court, is not challenged. Until that is done, we cannot presume that an action regularly instituted by them as attorneys, is without the sanction of their client, the plaintiff, and the novel proceeding taken by the defendants to dismiss the action by showing that the corporation plaintiff does not desire to maintain it, while the attorneys of plaintiff, who alone can speak for it in court, are opposing such dismissal, cannot be upheld, and the court was right in striking out that portion of the answer.

There was no error in admitting in evidence "the certified copy of the certified copy of the articles of incorporation of the Boston Tunnel Company."

By section 299 of the civil code such certified copy of the certified copy, required to be filed with the county clerk in order to enable a corporation to maintain certain actions, is made evidence equally with the original. It is not in any sense secondary evidence, but is by law made equal in all respects with the original, as evidence.

If it be urged that the county of Tuolumne is the county in which the original articles of incorporation were required to be filed by the corporation plaintiff—that section 299 of the civil code makes no provision for filing the copy of the copy of articles in the county where the original articles are filed, and therefore that the certified copy from the clerk's office of Tuolumne county, was not admissible in evidence, we may admit the proposition, and what follows?

Why, simply, that there was in Tuolumne county, where the original articles are filed, no necessity for filing a copy of the articles of incorporation duly certified by the secretary of state. By section 297 of the civil code, a copy, certified by the secretary of state, is made evidence of the facts therein stated, and if for any purpose it became, or was, proper to prove the organization of the corporation, this copy of a copy, so certified, was proper evidence by which to do so.

The fact that it had been filed in the office of the county clerk of Tuolumne county, where it had no need to be filed, did not militate against it as evidence. If not relevant to any issue made in the pleadings, its introduction could do no harm to appellants.

Objection is made that one L. Pierce, a witness, called on the part of plaintiff, was permitted to testify that he was a stockholder in the corporation plaintiff, and the secretary thereof. The objection is based upon the fact that the evidence is secondary—the records of the corporation being the best evidence of the facts stated.

The witness was called to prove possession of the demanded premises by defendants, the amount of money expended thereon by plaintiff, and other acts tending to show its prior possession. The fact of his being a stockholder and secretary, were, doubtless, called out for the purpose of showing his position to have been such as to give him opportunities for knowing the property concerning which he testified. Coming thus incidentally in the case, whether for the purpose of identifying the witness, or showing his opportunities for acquiring knowledge, it was not necessary to resort to the records of the corporation to prove the facts against which appellants' exception is directed. It was proper, for such purpose, to propound the questions and show by the answers that the witness was a *de facto* officer and stockholder in the corporation.

The answer of defendants, that the action was not commenced and is not prosecuted by the direction or with the consent of the Boston Tunnel Company, having been stricken out by the court on motion, there was no error in refusing to permit defendants to introduce evidence tending to prove the defense thus stricken out.

Defendants offered in evidence as a part of their chain of title to the demanded premises, a certificate of sale by the tax collector and a tax deed of the premises. These were admitted, subject to be stricken out, and before the cause was finally submitted were stricken out by the court. In this there was no error.

The certificate shows that for the year 1877, the demanded property was assessed to Boston Tunnel Company and valued at five hundred and fifty dollars. It recites the rate of taxation and the

amount of the tax at fourteen dollars and fifty-eight cents, the addition of five (5) per cent, and making the total amount thereafter due for state and county taxes, fifteen dollars and thirty cents. It then recites that John Reister was the bidder who offered to take, etc., "and pay the taxes and costs due thereon, including two dollars for this certificate, amounting in all to twenty-five dollars and thirty-one cents." That the property was thereupon struck off to him for said taxes who paid the full amount of said taxes, costs and charges, and therefore became the purchaser.

The description of the property is as follows:

"Possession of interest and claim to Grant mine, in district No. 2, in Table mountain, near Jeffersonville; bounded east by the Rosedale ranch, north by the Down East claim, south by D. T. Hughes & Co's mine; containing about three thousand feet, and known as the Boston Tunnel mine; improvements thereon consisting of whim house and car."

The sale occurred March 2, 1878, and the certificate is dated March 4, 1878.

By section 3,776 of the political code, the certificate of sale is required to be "dated on the day of sale, stating (when known) the name of the person assessed, a description of the land sold, the amount paid therefor, that it was sold for taxes, giving the amount and year of the assessment, and specifying the time when the purchaser will be entitled to a deed."

Section 3,786 of the same code provides that "the matters recited in the certificate of sale must be recited in the deed."

The tax deed fails to recite the amount for which the property was assessed. In reference to the sum for which it was sold, it first recites that the tax, with five per cent added, was fifteen dollars and thirty cents, and that the property was struck off and sold to John Reister for the sum of fifteen dollars and thirty cents, the said John Reister being the only person who would * * * and pay the amount of said taxes, five per cent costs and accruing costs, amounting to the sum of thirty-seven dollars and ninety-six cents, being the price paid for the same.

We think it is apparent from the certificate of sale and tax deed taken together:

1st. That the tax was fifteen dollars and thirty cents, and, 2d, that the property was sold for a sum greatly in excess thereof. Whether for twenty-five dollars and thirty-one cents, as specified in the certificate, or for thirty-seven dollars and ninety-six cents, as specified in the deed, matters not.

In Treadwell v. Patterson, 51 Cal., 637, it was held that a sale for anything more than is lawfully chargeable, is a sale without jurisdiction, and, therefore, void. Bucknall v. Story, 36 Cal., 67, is to the same effect.

Tested by the rule laid down in those cases, the sale was void.

The other objections to the deed and certificate of sale need not be noticed.

The objection that the cause was tried by the court without a jury comes too late.

The cause was, by consent of counsel, set down for trial on a day certain. On that day counsel for defendants appeared, and the cause was tried by the court without objection, and without a jury having been demanded. A jury was thereby waived: Greason v. Keteltas, 17 N. Y., 491; Black v. White, 37 N. Y., 320; Bradley v. Aldrich, 40 N. Y., 504; West P. F. v. Reymert, 45 N. Y., 703; Lewis v. Mott, 36 N. Y., 395.

We find nothing in the other objections urged requiring attention, and are of opinion the judgment and order appealed from should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. for the reasons given in the foregoing opinion the judgment and order are affirmed.

No. 9,821.

BULLARD *v.* STONE.

Department One. Filed September 25, 1885.

MARKET VALUE, HOW DETERMINED.—Upon a review of the evidence, *held*, that the market value of the wheat, in controversy, was sufficiently shown by the evidence, and was in conformity to section 3,354 of the civil code.

MONEY PAID UNDER CONTRACT—RECOVERY AFTER BREACH.—Money paid by plaintiff, under a contract, and in obedience to its requirements, may be recovered by him, upon the defendant's failure to perform.

INCOMPETENT EVIDENCE MUST BE OBJECTED TO.—A party cannot assign the admission of incompetent evidence as error, unless he objected thereto at the trial.

A REFUSAL TO GIVE INSTRUCTIONS WHICH HAVE ALREADY BEEN GIVEN in substance is not error.

APPEAL from a judgment of the superior court of Tehama county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

John F. Ellison and *Hart & White*, for the appellant.

F. C. Lusk, for the respondent.

SEARLS, C. This action is brought to recover damages for violation of a contract to sell and deliver a quantity of wheat. Cause tried by a jury. Verdict and judgment in favor of plaintiff for two thousand dollars. A motion for new trial was made and denied. The appeal is from the judgment and from an order denying a new trial.

On or about the fifth of December, 1882, the defendant entered into a contract with plaintiff for the sale and delivery by the former to the latter of seven thousand nine hundred and seventy-six sacks of wheat, aggregating one million ninety-seven thousand one hundred and sixty-one pounds.

At the date of the contract, four thousand four hundred sacks, containing six hundred and two thousand eight hundred pounds, were at Squaw Hill. A further quantity of one thousand and forty-five sacks, containing one hundred and forty-eight thousand three hundred and ninety pounds, and constituting a separate lot of wheat, was also at Squaw Hill. One thousand two hundred and forty-six sacks, containing one hundred and sixty-seven thousand four hundred and ninety pounds, were at Willows, and the remainder, consisting of one thousand two hundred and eighty-five sacks, containing one hundred and seventy-eight thousand four hundred and eighty-one pounds, at McIntosh Landing. All of which places are in Colusa county.

The wheat was to be paid for on delivery at the rate of one dollar and forty-seven and one-half cents per hundred for the two lots at Squaw Hill, and at the rate of one dollar and fifty cents per hundred for the residue. The wheat at Willows, and the smaller lot of one thousand and forty-five hundred sacks at Squaw Hill were delivered to plaintiff, and paid for by him. The wheat was in warehouses, and two receipts had been issued therefor, one of which was held by a bank and the other by one H. Kraft. At the date of the contract, plaintiff received an order for these warehouse receipts from defendant. It was agreed that plaintiff should pay all warehouse charges on the grain, and deduct the amount so paid from the purchase price.

He paid two hundred dollars on this account, and also expended one hundred and seventy-five dollars and seventy-one cents in necessary repairs to sacks, and in resacking some of the grain preparatory to shipment.

The attack of appellant upon the verdict of the jury, is two fold: First, he contends that the evidence failed to establish the necessary facts upon which to predicate a proper verdict for damages in such a case, and second, that, conceding the propriety of the verdict for some amount, it should not have exceeded one thousand five hundred and seventy-five dollars.

Section 3,308, of the civil code, is applicable to this case, and is as follows:

"The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been fulfilled."

What is meant by the excess of the value of the property to the buyer, is defined by section 3,354, civil code, as follows: "The value of property to a buyer or owner thereof, deprived of its possession, is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase."

The rules as formulated by these sections of the code, are not materially different from those understood to have existed prior thereto.

The market value of merchandise was said to be the measure of damages in cases of refusal to deliver, upon contract where payment had been made, and where payment had not been made, the excess of the market value over the price agreed to be paid was deemed the measure of damages.

By the market value was meant the price or sum for which an equivalent could be reasonably and fairly purchased at or near the place where the property should have been delivered, and within a reasonable time after refusal to deliver.

The testimony as to value of wheat was furnished by plaintiff and C. B. Hobart, both grain buyers at the very points where the wheat in question was to have been delivered. Plaintiff, after stating that for fourteen years he had been a grain buyer, and explaining as to the grade of the wheat in question, proceeds to say: "On December 8, 1882, I do not think I could have bought an equivalent lot of wheat for less than one dollar and eighty-five cents to deliver it at San Francisco, which would leave it one dollar and sixty-eight and three-quarters cents at Squaw Hill, or one dollar and seventy cents at McIntosh's, or one dollar and seventy-two and one-half cents at Willows. After I was refused that wheat, on the seventh and eighth, if I had started out, using reasonable diligence as a grain buyer would, in the market or markets nearest this place, Squaw Hill, in that market or markets nearest to it, I don't think I could have bought an equivalent lot of wheat—by equivalent I mean equivalent in quantity and quality—for less than one dollar and eighty-five cents per cental delivered at San Francisco, or, that is, one dollar and sixty-eight and three-quarters cents at Squaw Hill and one dollar and seventy cents at McIntosh's."

The witness Hobart testified to much the same effect, giving the prices at Squaw Hill, and the markets nearest it, and also at San Francisco, and later in his testimony explained that "it was worth from one dollar and eighty cents to one dollar and eighty-five cents in San Francisco; and after deducting freights, that would make it worth one dollar and sixty-seven cents to one dollar and sixty-seven and one-quarter cents at Squaw Hill."

We need not expect, nor is it essential, that witnesses testifying should clothe their ideas in those precise terms usually employed in pleading. They are expected to state such facts as are within their knowledge in their accustomed forms of expression, and from the language used, the idea is gained.

When the witnesses Hobart and Bullard stated *they did not think* wheat at a given point could be bought for less than a given price, and at the same time showed themselves informed as to the price, it was perfectly natural and proper, for the jury to infer, that the sum mentioned was the price, as well as the lowest price at which it could be purchased.

So, too, when they stated the market value of the commodity in San Francisco, the freight from the place of contract to San Francisco, and that the price therefor at the place of contract was as stated, and being the San Francisco price less the frieght, a jury would very naturally conclude that the San Francisco market regulated the price or market value of the article in the interior, and that at the latter point the market value was the price of the article at the former, less the cost of shipment to the central market.

These forms of expression may not always convey the exact information from which to infer the fact to be determined, but they will usually be found sufficient, and, in the absence of other factors, which, if wanting, it is the province of a cross-examination to develop, will be deemed sufficient.

Our language, as a vehicle to convey ideas, is not in all respects perfect. Witnesses are not always logicians or elocutionists, but we may ordinarily rely upon their capacity to make themselves understood, and that being comprehended, the practical good sense of the jury-box will usually result in correct conclusions from their utterances.

We see no error in the basis assumed for determining the damages or in the agency through which a result was reached, or in the result itself.

It is further urged that, conceding the validity of the verdict to the extent of one thousand five hundred and seventy-five dollars, it cannot be sustained as to the residue.

The complaint claimed that two hundred dollars was paid by plaintiff on account of the purchase price of the wheat, and that he incurred an expenditure of one hundred and seventy-five dollars and seventy-one cents for sacks and in resacking the wheat not delivered.

The evidence tended to show that the sum of two hundred dollars was paid, not to defendant, but to one of the warehouse men on account of storage of the wheat, that it was paid in pursuance of the contract, which provided that plaintiff should pay storage and deduct the amount thereof from the purchase money.

It also appeared that the charges for storage were, subsequent to suit brought, paid by the party who received the wheat, and that the warehouse man still holds the two hundred dollars paid him by plaintiff. This sum of money having been paid by plaintiff under the contract, and in obedience to its requirements, he is clearly entitled to recover it from defendant.

It was not paid under a mistake of fact. The warehouse man was entitled to his storage. Plaintiff was bound by his agreement to pay it, and did pay this amount. There was nothing voluntary about it, and plaintiff was not entitled, before suit brought, to recover it back from the warehouse man, and the contract having been broken by defendant, he became liable for this sum paid on account thereof.

As to the item of one hundred and seventy-five dollars and seventy-one cents: The evidence tended to show that this sum was

necessarily expended by plaintiff in preparing the wheat not delivered for shipment. As the wheat was never delivered to plaintiff, this item, if objected to at the proper time, would doubtless have been excluded, but no objection was raised, so far as we can see, to it until a motion for a new trial. The complaint contained an allegation of this expenditure. It might have been stricken out on motion, as forming no proper basis for special damages in a case where the property had never been delivered to plaintiff, and in which he consequently had no right to expend money upon it. Again, the testimony might have been objected to, at the trial, and ruled out, or a refusal so to do assigned as error. No such motion or objection was made.

A party cannot be permitted, under such circumstances, and after tacitly consenting to the introduction of testimony, to assign its admission as error.

The instructions given by the court, at request of plaintiff, stated the law correctly as applicable to the case.

Defendant's instructions, with a single exception, were erroneous and did not properly state the law as applicable to the testimony.

The last instruction, though subject to some verbal criticism, was in the main correct, and might with propriety have been given, but having already been given to the jury in ampler form, and free from all objection, we are of opinion defendant sustained no injury by its refusal.

Upon the whole case as presented, we are of opinion the judgment of the court below and the order denying the motion for a new trial should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 9,644.

AXTELL *v.* GERLACH ET AL.

Department One. Filed September 25, 1885.

A TAX SALE IS VOID, IF THE PROPERTY BE SOLD FOR A SUM GREATER, by one dollar, than was authorized by law.

UNLAWFUL CHARGES MADE ON SALE FOR DELINQUENT TAXES.—The act of 1880, providing for the protection of lands from overflow, other than lands recognized as swamp lands, does not authorize a charge of fifty cents for cost of preparing a delinquent list, or fifty cents for costs of certificate of sale.

VOID TAX DEED—INJUNCTION WHEN LIES TO RESTRAIN.—Injunction lies to restrain the making of a tax deed, under a sale void because made for a sum greater than that authorized by law. Such deed would not necessarily show the invalidity of the sale, if executed in conformity with the certificate of sale, and, if it did not, then evidence would be required *dehors* the recitals of the deed to ascertain the illegality of any of the items, to collect which the sale was made, and a cloud would thus be cast on the title.

VOID CERTIFICATE OF SALE FOR TAXES—ACTION TO QUIET TITLE AGAINST—INJUNCTION.—Under section 738, of the code of civil procedure, an action to quiet title against, and to cancel a void certificate of sale for taxes, may be maintained. In such action, if an injunction be granted against the making of a tax deed, the judgment will not be reversed.

APPEAL from a judgment of the superior court of San Joaquin county, entered in favor of the plaintiff. The opinion states the facts.

J. C. Campbell and *D. S. & S. L. Terry*, for the appellants.

J. B. Hall and *W. L. Dudley*, for the respondent.

FOOTE, C. Action to quiet title. Appeal from a judgment made therein.

The certificate of sale issued by the tax collector was properly ordered to be canceled; the sale was void, because the land was sold for a sum greater by one dollar than was authorized by law: Harper v. Rowe, 53 Cal., 236; Treadwell v. Patterson, 51 Cal., 637.

There was nothing in the law which imposed a tax *in invitum* upon property, which gave the right to charge this additional sum, viz., fifty cents for cost of preparing a delinquent list, and fifty cents for cost of certificate of sale. See "Act to provide for the protection of lands from overflow other than lands recognized as swamp lands," statutes of 1880, chap. 128, p. 227.

Those two charges were not authorized as a part of the "*manner*" in which the sale was ordered to be made: Sec. 9 of said act, and Buckwall v. Story, 36 Cal., 67. And further, that act itself, in section 11, makes express provision for the payment of the tax collector, and does not seem to contemplate that the land-owner, or his property, shall be responsible therefor. And the purchaser was not entitled to a decree ordering the land-owner to reimburse him for money paid out: Harper v. Rowe, *supra*.

It is contended that the certificate of sale being void upon its face, the deed, the making of which it was sought to enjoin, would be void on its face, and, therefore, an injunction ought not to have been granted, as no cloud on plaintiff's title would thereby appear.

Section 3,776, political code, does not require that the certificate of sale shall specify the particulars of the "amount paid," or the "amount of the assessment." *Non constat*, therefore, that the deed would necessarily do so if executed, and if it did not, then evidence would be required *dehors* the recitals of the deed to ascertain the illegality of any of the items, to collect which the sale was made, and a cloud would thus be cast on the title.

But upon the supposition that the deed itself, when executed, may properly show the purchaser's title to be void and no actual cloud rest on the plaintiff's title, yet under section 738, code of civil procedure, this action to cancel the certificate is a proper one: Hearst v. Egglestone, 55 Cal., 336; Harper v. Rowe, *supra;* People v. Center, 6 West Coast Rep., 150, 156.

The injunction is for the purpose of making effective the judicial determination of the invalidity of the defendant's adverse claim, "of an estate or interest in" the plaintiff's land. And as a means to attain that end, and prevent further controversy, if the deed should be executed and delivered, the injunction was granted and the judgment should not be reversed on that account: Brooks v. Calderwood, 34 Cal., 563.

It would serve no useful purpose to determine other questions raised in the case, and we are of opinion that the judgment of the court below should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

No. 9,798.

LOWDEN *v.* FREY ET AL.

Department One. Filed September 25, 1885.

CONFLICT OF EVIDENCE—FINDINGS—APPROPRIATION OF WATER.—In an action to determine conflicting rights to the waters of a given stream, where each party claims under an appropriation, the findings of the lower court will not be disturbed when the evidence is conflicting.

THE FINDINGS AND EVIDENCE REVIEWED, and *held* not to entitle the plaintiff to a judgment for damages.

APPROPRIATION OF WATER FOR MINING PURPOSES—NOT LOST BY EXHAUSTION OF MINE.—An appropriation of water for mining purposes generally, to be used at various points, is not lost by the exhaustion of the mine for which it was appropriated.

APPEAL from a judgment of the superior court of Trinity county, and from an order denying the plaintiff a new trial. The opinion states the facts.

W. J. Tinnin and *Burch & Lowenberg*, for the appellant.

C. E. Williams, *J. W. Philbrook* and *Hatch & Chadbourne*, for the respondent.

SEARLS, C. This is an action to fix and determine by a decree of court conflicting rights of plaintiff and defendants to the water of Grass Valley creek and its tributaries, to enjoin defendants from interference with the water adjudged to belong to the plaintiff, and to recover damages.

Plaintiff's grantors, in 1850, located what is now known as the Lowden ranch, situated in Trinity county, and through which a stream known as Grass Valley creek flows. The ranch was situated upon public lands of the United States.

In 1852, a ditch was constructed from the creek, and the waters thereof diverted and conducted through said ditch to the ranch, and there used for purposes of irrigation.

In 1854, defendant, Frederick Frey, and others, constructed a ditch from Grass Valley creek at a point above that of plaintiff, and extending to Ohio Flat and other points on Trinity river, for mining purposes. This last ditch is known as the Ohio Flat ditch.

The main issue at the trial was as to the extent of plaintiff's prior right to the water of said creek. Plaintiff had a decree adjudging her prior right to the use of one hundred and twenty inches of water, measured under a four-inch pressure, from which decree, and from an order denying a motion for a new trial, she appeals.

The contention of appellant is that she was entitled to a decree establishing her right to a much larger quantity of water than that adjudged her by the court, and that she was entitled to damages for past diversion of water by defendants. The prior right of plaintiff to forty inches of water is admitted by the pleadings.

At the trial it was stipulated in open court, by counsel for the respective parties, that "the evidence be confined to the issue upon the quantity of water appropriated by, and to which each of the respective parties is entitled, and to the question of damages, and that all other issues, if any, raised by the pleadings be ignored."

The testimony as to the extent of plaintiff's prior right to the water involved as substantial and radical a conflict as can well be imagined. It ranged, according to the statements of different witnesses, from thirty-six inches to sixteen hundred inches.

A certain ditch known as the Skinner ditch, and having a large capacity, is described by some of the witnesses, and its very existence ignored by others.

This marked conflict, may be accounted for in part by the fact that the witnesses were detailing from memory facts and circumstances occurring thirty years prior to the time at which they were called upon to testify.

Again, the tendency of all water ditches is, to increase in size and capacity by age. The constant erosion of their banks by the current of the water flowing through them, tends in some degree to their enlargements. The fact that debris, deposited from this source, and in many instances brought from other sources and deposited in such ditches, is necessarily removed in cleaning them, and is usually deposited upon the lower bank of the ditch, thus imperceptibly increasing its carrying capacity. All these circumstances are or may well be overlooked by honest witnesses who only remember that in their observation a given ditch has never, at any time, been specially enlarged, and when coupled with the fact that the increase in size is so gradual as not to attract particular attention, goes far toward explaining the very great discrepancy usually observed among witnesses, when testifying as to the capacity of ditches of long standing.

With this substantial conflict of testimony, and involving, as it does, so many elements of uncertainty, we are not at liberty to disturb the findings of the court below, by which the conclusion was reached, that plaintiff had a prior right to but one hundred and twenty inches of water.

It is objected by plaintiff that there is a conflict between the seventh and eighth findings of the court, and that the latter is in direct conflict with the testimony.

The seventh finding is to the effect that defendants threaten, and will continue to divert the water from said Grass Valley creek in derogation of plaintiff's right to one hundred and twenty inches of the first flow thereof, etc.

The eighth finding is, that plaintiff has sustained no damage by reason of the acts of the defendants.

The court previously found, in its sixth finding, that the defendants had always permitted one hundred and twenty inches of water to flow to plaintiff's ditch when the creek afforded that quantity, except from July 14 to August 14, 1883, when they permitted but forty inches so to flow.

The testimony of Bates, a witness for plaintiff, shows that during this same month, from July 14 to August 14, 1883, one hundred and twenty-three to one hundred and twenty-five inches of water actually flowed in the ditch of plaintiff, which was a larger quantity than the court finds it was entitled to receive, for which reason, as we suppose, it was found plaintiff was not damaged.

The apparent discrepancy in the finding that defendants only permitted forty inches of water to flow during the month indicated, while plaintiff was, in fact, using a much larger quantity, is explained by the testimony of defendant Frey and others, from which it appears that, while defendants denied the right of plaintiff to over forty inches of water, they in practice allowed a larger quantity to flow, when they were not using it themselves, and that plaintiff was in the habit of *taking it*, without reference to the claim of defendants.

In other words, the defendants denied plaintiff's right to any quantity of water exceeding forty inches, and sought to deprive her of all above that quantity, hence the sixth and seventh findings. They did not succeed in depriving her of the water, as they sought to do, and she was not damaged, hence the eighth finding.

The findings are not as clear and explicit as they might have been, but we cannot see that injustice has been done the plaintiff.

The decree in plaintiff's favor entitled her to costs of the action, therefore the question of her right to nominal damages, was of no practical importance in the case: Chambers v. Frazier, 29th Ohio St., 362.

The testimony tends to show that the appropriation of the water by defendants and their grantors, was for mining purposes generally, to be used at various points. Under such circumstances the position of plaintiff that "the right to the use of water for mining purposes, ceases with the exhaustion of the mine for which it was appropriated" has no application.

We find nothing in the errors of law assigned to warrant a reversal of the judgment or order denying a new trial, and are of opinion they should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 9,863.

ARNOLD, ASSIGNEE, ETC., v. KAHN.

Department One. Filed September 25, 1885.

ADJUDICATION IN INVOLUNTARY INSOLVENCY—PROCEEDINGS ARE IN REM—SERVICE BY PUBLICATION SUFFICIENT.—An adjudication of a debtor to be an involuntary insolvent, may properly be considered as *in rem*, as regards the status of such debtor. And publication of the notice required by section 10, of the act of 1880, is sufficient.

THE SAME—ASSIGNEE MAY MAINTAIN ACTIONS.—After a debtor has been adjudged an involuntary insolvent, the right to recover and distribute his property and rights in action, accrues to the assignee, and he may prosecute actions against and have recovery from parties, under said act, in the same manner as if personal service prior to the order adjudicating his status had been had on the debtor.

APPEAL from a judgment of the superior court of Colusa county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

John T. Harrington, for the appellant.

Jackson Hatch, for the respondent.

FOOTE, C. Action by an assignee to recover from a purchaser the value of goods bought from an involuntary insolvent, previous to adjudication as such, the sale being in violation of the provisions of the act of 1880.

The only point made or relied on by the appellant in his brief is that service of notice to show cause made upon the insolvent by publication, was insufficient in law to uphold an adjudication of involuntary insolvency.

He insists that, in such a case, personal service was necessary.

And in his brief, virtually concedes that all the proceedings were regular, and according to the requirements of that act, but claims they were not *in rem*, and that the adjudication of the status of the insolvent was *in personam* and void, and the contention of the plaintiff in this action without legal support.

We understand the proceedings such as were had against Lawson to have for their object the fixing of his status as an insolvent, and the reaching of his property as such, and its distribution ratably among his creditors.

The law under examination is similar to the late bankrupt law of the United States, and it has been declared by the federal judicial tribunals that "a decree adjudging a debtor to be a bankrupt is in the nature of a decree *in rem* as respects the status of the party:" Michaels v. Post, 21 Wallace U. S. Rep., 426.

In Pennoyer v. Neff, 95 U. S. Rep., fifth Otto, 725, the supreme court of the United States, while affirming personal service to be necessary in that case, distinctly stated that the principle there contended for did not affect cases "where the object of the action is to reach and dispose of property in the state," and said, "such service," meaning that by publication, "may answer in all proceedings which are substantially *in rem*." And this ruling has been followed by this court in Belcher v. Chambers, 53 Cal., 639.

An adjudication of a debtor to be an involuntary insolvent is like a decree of the same nature under the bankrupt law above mentioned, and may properly be considered as *in rem* as regards the status of such debtor. And publication of the notice required by section 10, act of 1880, is sufficient.

The debtor's status being thus legally fixed, the right to recover and distribute his property and rights in action, etc., accrues to the assignee, and he may prosecute actions against, and have recoveries from, parties, under said act, in the same manner as if personal service prior to the order adjudicating his status had been had on the debtor.

There is no error shown by the record, and the judgment and order denying a new trial should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

WEST COAST REPORTER.

WHOLE NO. 93. OCTOBER 8, 1885. VOL. VII. NO. 13.

SUPREME COURT OF NEVADA.

JAMES v. LEPORT.

Filed September 30, 1885.

AMENDMENT—STRIKING OUT NAME OF DEFENDANT—JUDGMENT OF DISMISSAL.—A plaintiff, who consents to an amendment, striking out the name of a party defendant, is entitled, after a demurrer has been filed for the non-joinder of such party, to have him made a party by an order of court. Such judgment of dismissal is not a judgment upon the merits, under section 151 of the practice act, and not a bar to further proceedings.

JUSTICE COURT—ACTION INVOLVING TITLE TO REAL ESTATE—TRANSFER OF TO DISTRICT COURT.—An action, originally brought in the justice's court, should be certified to the district court, if, during the trial of the cause before the justice, it appears that questions of title to real property are necessarily involved. The district court has jurisdiction thereof, although, after the transfer, the complaint is amended so as to change the cause of action.

APPEAL from a judgment of the second judicial district court of Ormsby county, entered in favor of the defendant. The opinion states the facts.

R. M. Clarke, for the appellant.

A. C. Ellis, for the respondent.

BELKNAP, C. J. The last amended complaint, filed on the twenty-third day of November, 1882, states a cause of action for breach of convenant in a warranty deed, made jointly by defendant and Richard Kirman. Kirman was not a party to the action at the time the pleading was filed, and as he had been made a defendant without leave of court, the complaint was stricken out upon motion. Afterwards, it was amended, by stipulation, by striking Kirman's name therefrom as a defendant, and an order of court asked making him a party. The motion was overruled. Thereafter, defendant demurred to the complaint, upon the ground of non-joinder of parties defendant, it appearing, from the complaint, that Kirman was a necessary party defendant. The demurrer was sustained. Plaintiff failed to amend his complaint, and judgment was entered against him.

The complaint was obnoxious to the demurrer. Plaintiff had, however, endeavored to cure the defect by asking for an order making Kirman a defendant. The refusal of the court to make the order, is sought to be sustained upon the ground that, at an early stage of the case, Kirman was—with Leport—a defendant to the action, and, upon motion of plaintiff, was dismissed. It is claimed that the dismissal operated as a *retraxit* as to Kirman, and that the judgment resulting therefrom is a bar to further proceedings upon

the cause of action stated in the complaint. Section 151 of the practice act, 1,212 comp. laws, provides, among other things, as follows: "An action may be dismissed, or a judgment of nonsuit entered in the following cases: First. By the plaintiff himself, at any time before trial, upon the payment of costs, if a counter claim has not been made." * * * Here follow four other subdivisions relating to judgments of nonsuit and dismissal not necessary to be particularly noticed because the case in hand does not fall within their conditions, and the section concludes as follow: "In every other case the judgment shall be rendered upon the merits." The judgment ordered falls within the provisions of the first subdivision of the above section. It was rendered upon motion of the plaintiff, and, as said by counsel for respondent, "as matter of law, then followed a judgment in favor of Kirman in this particular case for costs." The judgment was, by the express terms of the statute, not upon the merits, and is not a bar to further proceedings: Van Vliet v. Olin, 1 Nev., 495.

Again, it is claimed that the judgment in favor of respondent ought not to be disturbed, because, it is said, it is correct, even though based upon wrong grounds; and in support of this view, respondent contends that the district court had no jurisdiction to try the case made by the pleadings, and that respondent, therefore, should have recovered the judgment for costs which was rendered in his favor. The action was commenced in justice's court. The cause of action as crudely stated in that court, was to recover sixty dollars, overpaid upon purchase of house lot, and fifty dollars damages arising therefrom. During the trial of the cause before the justice, it appeared that the determination of the action necessarily involved questions of title to real property, and thereupon, he certified the cause to the district court. In that court the complaint was amended so as to change the cause of action. No reason has been suggested to us showing a want of jurisdiction in the district court to try the issue made. The court had jurisdiction of the parties. The action involved the question of title to real property, a subject matter within the jurisdiction of the district court, and not within the jurisdiction of the court of the justice of the peace. It may be that jurisdiction was irregularly acquired, and that the amended complaint which first contained the changed cause of action should have been stricken out upon motion seasonably made. The point was raised by demurrer. We think that defects of this nature cannot be reached in this way, because the defect complained of does not fall within any of the grounds for demurrer enumerated by the practice act: Sec. 1,103, Comp. L. There has been no discussion of the question whether under the provisions of the practice act a plaintiff may amend his complaint by setting forth a new cause of action, and upon this subject we express no opinion.

It is ordered that the judgment of the district court be reversed, and the cause be remanded.

SUPREME COURT OF WASHINGTON TERRITORY.

PARKER ET AL. v. DENNY.

Filed July 23, 1885.

APPEAL—NOTICE OF MUST BE SERVED.—In the absence of a voluntary appearance, an appeal by one of two beaten parties is ineffectual, unless the notice of appeal be served on the other.

THE SAME—CERTIFICATE THAT WHOLE OF EVIDENCE IS IN TRANSCRIPT.—The supreme court does not obtain jurisdiction of an appeal unless the transcript contains a certificate that the whole of the evidence is embodied in it.

NOTICE to dismiss an appeal. The opinion states the facts.

A. E. Isham, for the appellant.

Allen & Thompson, for the appellee.

GREENE, C. J. This is a motion to dismiss the appeal. The cause was brought here under the appellatory provisions of the code, by the appellant Hollon Parker.

Two grounds for dismissal are urged: 1st. That no notice of appeal as required by section 454 of the code, was ever served on John F. Boyer. 2d. That there is nothing in the transcript to certify this court that it has before it the whole of the evidence.

Both points we deem well taken. It was necessary and jurisdictional, for instituting this appeal, to make Boyer a party to it: Code, sections 454, 455, 458; 7 Peters, 399.

But he could only be made a party by a voluntary joinder or appearance, or in the compulsory mode provided by statute.

He has not appeared. A notice of intention to appeal was served on him, but no notice of the appeal actually prosecuted was ever given. He is not in court.

As to the other point, this court, following the case of Coleman v. Yesler, has several times decided that the whole of the evidence should be certified in an appeal case. The court must have the cause in its entirety before it in order to proceed. Section 451 of the code prescribes the form of certificate, and no certificate but the statutory will prevail.

We cannot get jurisdiction by stipulation, or estoppel, or waiver. No statutory certificate is here.

The motion is granted.

HOYT, A. J., and TURNER, A. J., concurred.

BUDD ET AL. *v.* WALLA WALLA PRINTING AND PUBLISHING CO.

Filed July 24, 1885.

CORPORATION—CHAIRMAN MAY ACT AS SECRETARY OF MEETING.—The fact that the chairman of a meeting of the board of trustees of a corporation acted also as its secretary, and kept the minutes of the meeting, neither invalidates the action of the meeting, nor the minutes of that action as taken down and recorded by him.

THE SAME—MEETING PRESUMED TO BE REGULAR—NOTICE.—Every meeting of the board of trustees of a corporation, to be valid, must be regular; that is, must be stated meetings, or meetings called pursuant to authoritative notice. Yet, it does not follow, that when the meeting is not a stated one, proof or recital of notice must appear on the face of the record. Any needed proof of the regularity of the meeting may be supplied *aliunde*, and until the contrary appears, the proceedings will be presumed regular.

THE SAME—CONTRACT IN FAVOR OF TRUSTEE—TRUSTEE VOTING IN FAVOR OF.—All evidence of indebtedness, executed by a corporation, to one of its trustees, in pursuance of the unanimous vote of the board of trustees, is not void, in the absence of evidence of fraud, simply because the trustee in whose favor it was made, was present at the meeting, and voted for the same

APPEAL from a judgment of the district court. The opinion states the facts.

B. L. & J. L. Sharpstein, for the appellant.

A. E. Isham, for the appellee.

GREENE, C. J. According to the transcript, the cause now before us for review was begun by appellants in the district court on the twenty-sixth of May, 1883, to recover from appellee, which is a corporation, the amount of a warrant issued by the corporation through its president, on the twenty-eighth of April, 1883, and payable to appellants, or their order. For payment, the warrant was, on the day of its issue, presented to the treasurer of defendant, and by him accepted, but, owing to lack of funds, not paid. Refusal to pay occasioned the suit.

It appears from an allegation of the answer, undenied by the the reply, that, at and for a long time before the issuance of the warrant, the affairs of the corporation were managed by a board of five trustees, of whom one of the plaintiffs was one. Eventually, the cause came to trial, upon issues duly framed as to whether or not the corporation issued the warrant, and whether the warrant was not, as against the defendant, fraudulent and void. Nothing is alleged in the pleadings as to any ratification of the warrant.

Defendant's by-laws and the warrant were offered in evidence on the trial, by plaintiffs, and were, without objection, admitted.

On admission of these, plaintiffs next offered the proceedings of a meeting of the trustees held on the twenty-third of April, 1883, which proceedings included a resolution then passed by the board, and purporting to authorize the issuance of the warrant. From the face of the proposed evidence, it was apparent that the same person acted both as president and as secretary of the meeting; that four of the five trustees were present; that the resolution passed unanimously; and that the plaintiff trustee was present and voted its passage. But there was nothing to show that the meeting was a stated meeting, or was called pursuant to any notice.

To the admission of this evidence defendant objected:

1st. Because the president acted also as secretary of the meeting;
2d. Because the plaintiff trustee was present and voting; and
3d. Because no notice of the meeting appeared.

Holding with the defendant as to one or more of the points made, the judge sustained the objection, and excluded the evidence. Exception was duly taken by plaintiffs, and allowed by the court.

Without tendering more evidence, plaintiffs then rested. On this, the court, at defendant's request, instructed the jury that the warrant was void for the reason that one of the plaintiffs was a trustee when it was issued, and could not contract with himself. Reasoning thus, the court proceeded further to instruct the jury to find for the defendant, to which instruction and the other instruction plaintiffs duly saved exceptions. Left without option, the jury, of course, returned a verdict for defendant, and this verdict the plaintiffs, in vain, endeavored, by a motion for new trial, to set aside. Defendant followed up its verdict by taking the judgment, from which the plaintiffs, under the act of 1883, have sued this appeal.

In view of these occurrences in the lower court, the soundness of the judgment is conceded to depend upon the correctness of the ruling of the judge upon the admissibility of the evidence offered and rejected. Simply because the chairman of the meeting of the board of trustees acted also as its scribe would, in our opinion, operate to invalidate neither the action of the meeting nor the minutes of that action as saken down and recorded by him. There has been no authority cited bearing on the point, and, perhaps, there is none that could be.

How the duty of mere moderator can conflict with the duty of mere clerk, save in the matter of dispatch of business—a matter which must be determined by the meeting such officers serve—or how the one officer can be a check upon the other, is not easy for us to see. Every assembly, in the absence of its regular secretary, must decide for itself whether its minutes shall be kept by a person other than its presiding officer, who may be the fittest, or only fit, person present to act as scribe. Even though the president and secretary be charged by statute with incompatible functions, the former officer would not thereby be prevented, in the absence of the latter, from accepting, and discharging, *pro tempore*, for the latter, a function not incompatible. No force, therefore, we think, should be attributed to the first ground of objection to the proffered evidence.

Every meeting of board of trustees, to be valid, must, no doubt, be regular meetings; that is to say, cannot be valid unless they be stated meetings or meetings called pursuant to authoritative notice. Yet it does not follow that when the meeting is not a stated one, proof or recital of notice must appear on the face of the record of proceedings. Our opinion is, that any needed proof of the regularity of the meeting might be supplied *aliunde*, and that, until the contrary appeared, the proceedings would be presumed regular: Bank of U. S. v. Dandridge, 12 Wheat., 64; R'y Co. v. McCarthy, 96 U. S., 258; Gelpecke v. City of Dubuque, 1 Wall., 221.

From these points, therefore, we pass to the main questions, whether the simple fact of the plaintiff being trustee, or the more complex fact of his presence and action at the meeting, would render the apparent corporate action void. Giving his vote was a formal, but not a substantial, participation in the doings of the board. On the business in hand he had no power to pass, and, therefore, his seeming exercise of power cannot be considered as real or effective. Doubtless, in the absence of statute to the contrary, the corporation could contract with him, for its interest might lie that way. Admitting this, it would seem to follow, that he could treat with the corporation through its proper business functionaries, the trustees other than himself, doing it in a fair and openhanded manner, and he could appear before them in his own interest, and in good faith press them to comply with his desires or necessities.

More than this, we are not at liberty to presume that the plaintiff trustee did.

Every case may, indeed, suggest suspicion of fraud, and in a particular case fraud may perhaps be established by proof; but a court will always regard a transaction as honest until, by competent evidence, it is shown to be otherwise. No evidence sufficient to prove fraud got before the court on the trial of this cause, and even if it had, the office of passing upon its sufficiency would have fallen to the jury.

As to these main questions, the authorities are somewhat divergent, but the weight of them and the better reason accord with our views. Most of the decisions that seem to favor a contrary doctrine are controlled by statutory provisions or are based upon circumstances displaying actual or constructive fraud. Enough books to show the reasoning and attitude of the courts in the premises are cited when we name the following: Angell and Ames on Corp., 8th ed., sec. 233, and citations; U. S. R. S. Co. v. R. R. Co., 34 Ohio St., 450; Hallam v. Indianola H. Co. *et al.*, 56 Iowa, 178; Neal v. Hill *et al.*, 16 Cal., 146; Smith v. Skeary, 47 Conn., 47; Duncomb *et al.* v. N. Y. H. & N. R. R. Co. *et al.*, 88 N. Y., 1; Leavitt v. Oxford & G. S. M. Co., 2 West Coast Rep., 462; Sutter St. R. R. Co. v. Baum, 4 id., 916; Twin L. O. Co. v. Marbury, 91 U. S., 587; Pneumatic Gas Co. v. Berry *et al.*, 113 U. S., 322.

Nothing remains but to add that the judgment of the district court must be reversed, and the cause remanded for a new trial.

HOYT, A. J., and Turner, A. J., concurred.

PAGE *v.* RODNEY.

Filed August 4, 1885.

WHERE THE EVIDENCE IS CONFLICTING, AN ORDER refusing a new trial will not be disturbed.

ERROR to the district court. The opinion states the facts.

Elwood Evans, for the plaintiff in error.

J. M. Ashton, for the defendant in error.

WINGARD, A. J. This is a suit at law in which the plaintiff in error, who was defendant below, seeks to reverse a judgment of the district court, and secure a new trial.

The substantial error complained of is, overruling the motion of plaintiff in error for a new trial, upon causes in said motion alleged.

Juries are the exclusive judges of the facts adduced in evidence before them at the trial, and while judges before whom a cause is tried would sometimes return a different verdict from that found by the jury, were it their province to do so, it is no abuse of discretion in all such cases to refuse a new trial.

As early as 1855 this court held that nothing but an abuse of discretion on the part of the court, or a great preponderance of evidence against the verdict, will cause this court to interfere: Gove v. Moses, 1 Wash. Ter. Reports, 9. And the principle of this decision has since been adhered to: Id., 544, 570, 588; 5 Nev., 415.

The record in this case discloses a conflict of evidence, and we cannot say that the court erred in refusing a new trial.

The affidavit purporting to set up after discovered evidence affords no grounds for a new trial.

Let the judgment of the court below be affirmed.

GREENE, C. J., and TURNER, A. J., concurred.

PARKER v. D'ACRES ET AL.

Filed August 4, 1885.

FORECLOSURE OF MORTGAGE—NO REDEMPTION FROM SALE.—Property sold under a decree of the district court, to satisfy a mortgage, is not subject to redemption under the act of 1873. Doubtless a court of equity may impose, as a condition of sale, the right of the mortgagor to redeem upon proper conditions within a certain time. But, in the absence of any such condition in the decree of foreclosure, the sale is absolute.

RIGHT TO REDEEM, BARRED IN TWO YEARS.—The right of a mortgagor, to redeem from a foreclosure sale, conceding it to exist, is barred in two years, under section 33 of the code.

APPEAL from the district court. The opinion states the facts.

A. E. Isham, for the appellant.

Allen, Thompson & Crowley, and *B. L. & J. L. Sharpstein*, for the appellees.

TURNER, A. J. This is a suit in equity, brought by the appellant as plaintiff in the lower court, to redeem property sold under a decree of the district court, foreclosing a mortgage. The complaint alleges, in substance, that, on the twenty-eighth day of December, 1874, and ever since, the appellant was the owner in fee of the property described in the complaint; that on the second day of January,

1875, said property was sold by the sheriff, at public auction, under and by virtue of the decree of foreclosure, and that the same in separate lots was bought at said sale by the respective defendants, the complaint describing the particular part or parcel purchased by each defendant; that afterwards, and before the expiration of six months from the confirmation of said sale, the plaintiff, after giving the defendants due and legal notice that he would apply to redeem said property, tendered to the sheriff of Walla Walla county, in his office, during office hours, the amount of money necessary to redeem the same; that the said sheriff refused to receive the money so tendered, or to recognize the right of appellant to redeem said land, and that the appellant now brings into court and deposits with the clerk the amount of money so tendered to the sheriff; that the defendants wrongfuly and unlawfully, on the second day of January, 1875, severally entered upon the premises purchased by them at the mortgage sale, and have ever since, and now hold the same; that by reason of the wrongful refusal to permit appellant to redeem, and the unlawful deprivation of his possession by the defendants, he has been damaged in rents, issues, profits, etc.; that the defendants each hold deeds to the property purchased by them at the mortgage sale, made to them by the sheriff of Walla Walla county, which deeds are of record, and are fraudulent and void.

The complaint prays that the deeds executed to the defendants by the sheriff be declared null and void; that the sheriff, as a commissioner of the district court, be required to make and deliver to plaintiff a good and sufficient deed to said property, and that plaintiff be let into possession of the same; that plaintiff have and recover damages for the unlawful detention of the possession of the property and for general relief.

The defendants demurred to the complaint, because:

1. It does not state facts sufficient to constitute a cause of action;
2. Several causes of action have been improperly united in the complaint.

The lower court sustained the demurrer, and the plaintiff, declining to amend his complaint, brings the cause to this court by appeal.

The appellant bases his right to redeem the property upon the provisions of the civil practice act of 1873, chapter 33, which governed his rights at the time of the mortgage sale, and of the offer to redeem.

This chapter is substantially the same as chapter 34 of the code of 1881, except that section 379 of the code is not found in the law of 1873. The exclusion of the right to redeem from mortgage sales is made plain and unmistakable in the code of 1881, by the addition of the last named section. We think the same conclusion must be reached upon a consideration of the law of 1873, notwithstanding the absence of a provision analagous to that contained in section 379. Chapter 33, of the act of 1873, deals entirely with executions at law, and the right to redeem, granted by sections 364, 365 and 366 of

that act, does not, in terms, or by fair implication, extend to property sold in any other manner.

The act explicitly defines what an execution shall be: Sections 321, 322 and 323.

This execution is entirely different from the order of sale issued by the clerk upon a decree of foreclosure: Section 565.

The conclusion that property sold under the decree of the district court to satisfy a mortgage, is not subject to redemption under the act of 1873, is enforced by a consideration of the nature of mortgages under our system, and of the effect of our foreclosure proceeding. A mortgage of real property in this territory does no more than create a lien. In the apt language of a learned author, "the debt is the principal fact, and the mortgage is wholly incidental or collateral thereto, and intended to secure its payment. The right or interest of the mortgagee from being a legal estate is changed into an equitable right, enforceable by an equitable proceeding; it is for all purposes and under all circumstances personal assets; it may be assigned, and passes to the mortgagee's personal representatives on his death. * * * The mortgagee's interest being a mere lien, it is wholly destroyed, and the mortgagor's estate is left free and unincumbered, by a payment of the debt secured by it at any time before the premises are actually sold under a decree of foreclosure:" Pomeroy's Equity Jurisprudence, section 1,188.

The proceeding to foreclose such a mortgage is entirely different from that to foreclose the equity of redemption, which, to meet the hardships of the common law conception of a mortgage, was the creation of the courts of equity. Under our theory of a mortgage, there is no such thing as an equity of redemption in the mortgagor. The legal title has never passed from him. The equity is in the mortgagee and consists in his right to have the mortgaged property sold to secure the payment of the mortgage debt. This being so, a provision which permitted property sold under a decree of foreclosure to be redeemed from the purchaser by the mortgagor within six months, would diminish the security which the mortgagee has by the terms of the mortgage for the payment of his debt. Property sold free from the right to redeem, would ordinarily bring a better price than property sold subject to the right to redeem. It is not to be supposed that it was the intention of the law to alter the contract which the parties have made for themselves, and to impose an onerous condition upon one of them not provided in the contract. Unless the language of the law is plain and conclusive, when the security is ample, no doubt a court of equity, by virtue of its inherent equitable power, may impose as a condition of sale, the right of the mortgagor to redeem upon proper conditions within a certain time. But in the absence of any such condition in the decree of foreclosure, the sale is absolute.

The decree need not bar the equity of redemption because there is no such thing. Whether or not it shall affirmatively provide for

a redemption, is a matter for the conscience of the chancellor upon a view of the facts of the case.

This view of the law is conclusive of this cause. The demurrer to the complaint was rightfully sustained.

The demurrer was properly sustained upon another ground. The cause of action, if any were in the plaintiff, accrued in the year 1875. The complaint in this case was not filed until May 15, 1884. The limitation for such an action is that provided by section 33 of the code, and is two years: Hubbell v. Sibley, 50 N. Y., 468; Miner v. Beekman *et al.*, 50 N. Y., 337.

The judgment of the court below is affirmed.

GREENE, C. J., and HOYT, A. J., concurred.

MERCHANT ET AL. *v.* HUMESTON ET AL.

Filed August 4, 1885.

MECHANIC'S LIEN—STATEMENT OF DEMAND—CREDITS AND OFF-SETS.—A notice for a mechanic's lien is sufficient, although in the statement of the demand the words "over and above all credits and effects," are substituted for the words "over and above all credits and off-sets," mentioned in the statute.

THE SAME—NOTICE OF LIEN—AMOUNT DUE FOR MATERIALS FURNISHED, HOW STATED.—A notice of lien set out that the lienor furnished materials used in the construction of seven certain dwelling houses situated on certain named lots, upon which there was due and unpaid the sum of seventy-nine dollars and fifty-six cents, and claimed a lien therefor, "in the proportion aforesaid" to wit, twelve dollars and seventy-four cents upon each of the seven houses. *Held*, that the notice was insufficient, in the absence of an allegation that of the materials furnished twelve dollars and seventy-four cents worth, or any other certain amount, went into any particular house.

APPEAL from the district court. The opinion states the facts.

A. L. Palmer, for the plaintiffs in error.

Burk & Haller and *C. H. Hanford*, for the defendants in error.

HOYT, A. J. This action was brought to foreclose four certain liens for labor done and materials furnished in the construction of seven houses situated on lots five and six in block thirty-nine in Maynard's plat in Seattle.

The court below sustained a demurrer to the complaint, on the ground that the notices of liens set out therein were, and each of them, was insufficient and void, and the plaintiffs have brought the cause here by appeal, to correct the ruling of the court on said demurrer.

The appellees, to sustain the action of the lower court, rely upon two specifications of the insufficiency of said lien notice.

First. That the statement of the demand for which lien is claimed is not sufficient, because in the statement thereof, the lien has substituted for the words "over and above all credits and offsets" mentioned in the statute, the words "over and above all credits and effects," but we are of opinion that if we apply the liberal rule of construction invoked by the legislature as to this lien law, we can either substitute for said word "effects" in said notice the proper word "offsets," or that the expression "over and above all

credits" taken in connection with the other allegations of these notices is a substantial compliance with the statute without the addition of the words "or offsets."

We therefore think that this statement in these notices was sufficient. The other alleged defect in these notices is, that there is no sufficient description of the property to entitle said liens to be enforced as against the defendants who appeared in the cause, who were incumbrancers of the property against which said lienors were seeking to enforce their liens.

The notices were not exactly alike and if we find any of them sufficient, the demurrer must be overruled; we will therefore investigate that of Ballard & Son, which was conceded on the argument to be the best one of the four.

This notice sets out that they furnished materials used in the construction of seven certain dwelling houses situated on said lots five and six, upon which there was due and unpaid the sum of seventy-nine dollars and fifty-six cents, and claims a lien therefor "in the proportion aforesaid" to wit, twelve dollars and seventy-four cents upon each of the seven houses; the words "proportion aforesaid" having, however, nothing in the notice upon which it could be predicated, unless it was the statement that the said seven houses were of about the same size. And there is nowhere in said notice an allegation that of the materials furnished twelve dollars and seventy-four cents worth, or any other certain amount, went into any particular one of said houses, excepting a repetition towards the close thereof of the words "in the proportion aforesaid." And we do not think this loose statement sufficient to show that of the said materials any particular amount went into any one of said houses, and without such an allegation, there is no foundation for the claim of lien.

In order to make said lien claim of twelve dollars and seventy-four cents enforceable against any or each of said houses, it should at least appear by direct averment, that that particular amount of material had gone into the particular house in question and was unpaid for, and that a lien was claimed therefor, and should further contain a description of the property upon which such house was situated sufficient for identification, and to say that a particular house is one of seven, all of which are situated on two certain lots, is no designation at all as to the location of said particular house, as there is nothing tending even to show as to which of said two lots it is upon.

If the claimant had set out in his notice that he furnished said material as a single transaction for the building of the seven houses and that they were all built as substantially one building, and claimed a lien on the whole thereof for his entire claim, a different question would have been presented; but he saw fit to claim seven distinct liens of twelve dollars and seventy-four cents each, and in order to sustain such lien on any one house, there must be such direct averments as would make such claim good if it stood alone, unconnected with the claims against the other houses. Of

course, some of the statements could be grouped, but it must clearly appear that the lien for the sum of twelve dollars and seventy-four cents claimed upon any one house, is for that amount of unpaid-for materials used in the construction thereof, and said notice must further contain a definite description of that particular house, so as to identify it not only with all the others, but also from all the others.

We have already seen that the most liberal construction of this notice will fail to make of any averment therein, even substantially, a statement of these necessary facts.

It follows that the notices were void and that the action of the court in sustaining the demurrer to the complaint was correct, and that the decree rendered thereon must be affirmed, and it is so ordered.

WINGARD, A. J., and TURNER, A. J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 9,609.

O'BRIEN *v.* COUNTY OF COLUSA.

Department One. Filed September 26, 1885.

MONEY PAID FOR ILLEGAL LICENSE CANNOT BE RECOVERED.—No action lies to recover money voluntarily paid in satisfaction of an illegal license. Section 3,804 of the political code does not authorize such action.

APPEAL from a judgment of the superior court of Colusa county, entered in favor of the defendant. The opinion states the facts.

Hart & White, for the appellant.

Edwin Swinford and *T. J. Hart*, for the respondent.

FOOTE, C. This is an action against Colusa county, to recover moneys alleged to have been "illegally and erroneously" collected for licenses, paid by divers persons who, before suit, assigned their claims to the plaintiff.

The several sums of money sued for, according to the allegations of the complaint, were *voluntarily* paid, and not for or on account of any *property taxes* assessed.

Section 3,804, political code, which the plaintiff relied on to support his contention, does not apply to an action of this kind. And no rule of law authorizes him to recover: Harper v. Rowe, 53 Cal., 234; Loomis v. County of Los Angeles, 59 Cal., 456.

The demurrer to the complaint was properly sustained and the judgment should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

No. 11.027.

RECLAMATION DISTRICT NO. 3 v. PARVIN ET AL.

Department One. Filed September 26, 1885.

RECLAMATION OF SWAMP LANDS—ACTION FOR DELINQUENT ASSESSMENT MAY BE BROUGHT IN NAME OF DISTRICT.—An action to recover delinquent assessments for the reclamation of swamp lands, may be brought in the name of the reclamation district, as the real party in interest.

THE SAME—COMMISSIONERS MUST JOINTLY VIEW AND ASSESS.—The provision of section 33 of the reclamation statute, requiring the commissioners to "jointly view and assess upon each and every acre to be reclaimed or benefited, a tax," etc., only means that the three commissioners, acting jointly or together, shall view or assess, etc.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the defendants. The opinion states the facts.

H. L. Buckley and *G. W. Gordon*, for the appellant.

McKune & George, for the respondents.

BELCHER, C. C. This is an action to recover a delinquent assessment upon certain lands situated in the reclamation district, which is named as plaintiff. The defendants demurred to the complaint upon the ground that the action should have been brought in the name of the people of the state of California as plaintiff, and not in the name of the district and upon the further ground that the complaint was ambiguous, unintelligible and uncertain.

The court sustained the demurrer, and the plaintiff declining to amend, judgment was entered in favor of the defendants.

From this judgment the appeal is taken.

1. The plaintiff was organized as a reclamation district under the provisions of the "Act to provide for the management and sale of the lands belonging to the state," approved March 28, 1868. Under this act delinquent assessments were to be collected "in the same manner as is provided by law for the collection of state and county taxes:" Sec. 35; and it has been held that actions to collect such assessments were properly brought in the name of the people as plaintiff: People v. Hagar, 52 Cal., 171; People v. Haggin, 57 Cal., 579. It has also been held since the decision upon the demurrer in this case, that actions to collect such assessments may be maintained when brought in the name of the reclamation district as plaintiff, the district being the real party in interest: Reclamation district, No. 108 v. Hagar, 4 West Coast Rep., 283.

That decision is decisive of the point now raised here.

2. The point that the complaint is ambiguous, unintelligible and uncertain, is not well taken. The statute, section 33, required the commissioners to "jointly view and assess upon each and every acre to be reclaimed or benefited thereby a tax," etc.

The word "jointly" qualifies the words "view" and "assess," but it means only that the three commissioners, acting jointly or together, shall view and assess, etc.

The complaint alleges that the commissioners jointly viewed the lands in the district and jointly assessed upon each and every acre

to be reclaimed or benefited thereby the amount of the assessment in proportion to the whole expense and to the benefits to result from the works of reclamation, and that they made a list showing the amount of the charges assessed against each tract of land in the district, with other necessary particulars.

This, we think, was sufficient.

It results that the judgment should be reversed and the cause remanded, with directions to the court below to overrule the demurrer.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded, with directions to the court below to overrule the demurrer.

No. 9,908.

KELLY *v.* BROWN.

Department One. Filed September 26, 1885.

UPON A CONSIDERATION OF THE EVIDENCE, *held*, that the judgment and order denying a new trial should be affirmed.

APPEAL from a judgment of the superior court of Modoc county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

E. V. Spencer, for the appellant.

F. W. Ewing and *C. L. Claflin*, for the respondent.

SEARLS, C. This is an action for the recovery of personal property, and was tried by the court without a jury. Defendant had judgment, and plaintiff prosecutes this appeal.

Defendant introduced no testimony in the court below.

The question presented is not one where there is a conflict of testimony, for there was no conflict, but rather a question of the correctness of the findings on the testimony introduced.

The testimony of plaintiff, who was the principal witness in his own behalf, is not as full and clear on the several points to which he spoke as could be desired.

Upon all the testimony presented, we should feel inclined, were the case submitted to us as an original proposition, to find that the transactions in evidence constituted a sale *in presenti*, and not a contract for a sale, but some deference should be paid to the action of the court who heard the testimony, whose opportunity to arrive at a correct conclusion as to the facts was somewhat superior to our own.

In this view, and regarding the case as one in which a difference of opinion may reasonably exist as to the facts to be deduced from the evidence, we are of opinion the judgment and order denying the motion for a new trial should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 9,678.

IN RE DISBARMENT OF HOUGHTON.

In Bank. Filed September 26, 1885.

DISBARMENT OF ATTORNEY—SWEARING TO LEGAL EFFECT OF STIPULATION.—On January 7, 1885, the supreme court made an order, referring the settlement of a bill of exceptions to a certain judge. Subsequently, the attorneys for the parties interested, of whom the respondent was one, entered into a stipulation for the continuance of the hearing of the settlement of the bill of exceptions. Thereafter a motion was made in the supreme court to set aside the order of reference of January 7, 1885. That motion was contested by the respondent, who filed an affidavit in which he stated that it had been stipulated that the bill of exceptions should be settled by the judge. On the argument of the motion the respondent, in reply to a suggestion that the stipulation was, or might have been, a stipulation merely to continue the hearing, replied: "No; the stipulation is as stated in the affidavit." *Held*, that the evidence did not show that the respondent intentionally made a false statement for the purpose of misleading the court, and that, consequently, he ought not to be disbarred.

THE PRACTICE OF SWEARING TO THE LEGAL EFFECT OF WRITTEN STATEMENTS, in the form of a positive averment, commented upon and condemned.

APPLICATION for the disbarment of an attorney. The opinion states the facts.

W. W. Foote, for the petitioner.

McAllister & Bergin, *Edw. Gray Stetson*, and *Warren Olney*, for the respondent.

MCKINSTRY, J. On the seventh day of January, 1884, this court made an order "In the matter of the estate of Allen E. Rose, deceased," wherein (after reciting that William B. Rose, as guardian of the estate of Louis Allen Rose, aged seven years, Lydia Rose, aged three years, and Ethel Rose, aged two years, only heirs of Allen E. Rose, deceased, and as a creditor of the estate of said Rose, had presented a petition for leave to prove a bill of exceptions to be used in this court on an appeal taken by him, as such guardian and creditor, from an order made in the superior court of Kern county, allowing the account of H. Hirshfield, administrator of the estate of said Allen E. Rose, deceased, and alleging in the said petition that the hon. B. Brundage, judge of the said superior court for Kern county, refuses to allow said bill of exceptions) orders: That said petition be referred to the hon. W. W. Cross, judge of the superior court of Tulare county, and that said petitioner appear before said W. W. Cross and prove his bill of exceptions in accordance with the facts, in case said bill has not been properly settled, and when so proven, the same to be certified as correct by the hon. W. W. Cross and filed in the superior court of Kern county. The order further required Judge Cross to give a certain notice of the time, etc., when the bill was to be settled to Judge Brundage, the attorney appointed by Judge Brundage to represent minor heirs, and the attorney of Rose.

The hearing of the motion to settle the bill of exceptions was set by hon. W. W. Cross for the twenty-sixth day of January, 1884, and notice thereof served on the several parties named, as required by the order of the supreme court. On the twenty-first day of said January, J. W. Freeman, esq., attorney for the minor heirs, R. E. Arick,

esq., attorney for the administrator, and Stetson & Houghton (R. E. Houghton), attorneys for petitioner, entered into and signed a *stipulation*, in words and figures following:

"In the matter of the settlement of a bill of exceptions—estate of Allen E. Rose, deceased.

"The hearing in the said matter having been heretofore set by Judge W. W. Cross for Saturday, January 26, 1884, at 10 o'clock, A. M., at Visalia, California, we consent that the hearing may be continued to Saturday, the second day of February, 1884, at 10 o'clock A. M., at the same place."

On the twenty-ninth of January, 1884, H. Hirshfield, administrator of the estate of Allen E. Rose, deceased, by Flournoy, Mhoon & Flournoy, as his attorneys, moved this court (department two), upon affidavit of said Hirshfield, that the order of the seventh of January, referring the petition of W. B. Rose, as guardian, etc., to the hon. W. W. Cross, and authorizing him to settle the proposed bill of exceptions, be vacated and set aside; which said motion was continued for hearing until the first day of February, 1884. On the day and year last mentioned, R. E. Houghton, esq., appeared in opposition to said motion, and J. B. Mhoon, esq., in support thereof, and the said R. E. Houghton, esq., then and there, before department two aforesaid, read in opposition to the motion his affidavit (previously filed), duly subscribed and sworn to by him, a portion whereof is as follows:

"In the supreme court of the state of California, in the matter of the estate of Allen E. Rose, deceased.

"State of California, city and county of San Francisco, ss.: R. E. Houghton, being duly sworn, says: That he is a member of the firm of Stetson & Houghton, attorneys for the petitioner herein; that Judge W. W. Cross, to whom this court referred the petition of W. B. Rose, to prove a bill of exceptions proposed by him to be used by him on an appeal heretofore taken in this case from an order of the superior court of Kern county, allowing an annual account of the administrator of said estate, did, by order, fix the twenty-sixth day of January, 1884, at ten o'clock A. M., as the day and hour he would settle said bill of exceptions. R. E. Arick, esq., who is the attorney of record in this case for H. Hirshfield, administrator of said estate, J. W. Freeman, appointed by the court to represent the minor heirs of said estate, and Stetson & Houghton, attorneys for petitioner herein, *have stipulated* that said bill of exceptions *shall be settled by the hon. W. W. Cross* on February 2, 1884, at 10 o'clock A. M., at Visalia." On the first day of February, 1884, when said affidavit was read, the motion to vacate and set aside was argued orally by J. B. Mhoon, esq., and R. E. Houghton, esq. The testimony taken before the referee appointed in the present proceeding and returned to this court shows that on the hearing of the said motion to vacate, when the said R. E. Houghton read that portion of his affidavit above recited, it was suggested to him that the stipulation was, or might have been, a stipulation merely to continue

the hearing before Judge Cross, to which he responded: "No; the stipulation is as stated in the affidavit." Objection was made to the testimony last mentioned. We think, however, that the objection is not well taken. The evidence tended to show that the statement in the affidavit was not inserted inadvertently; perhaps, also, that the affiant understood the same to mean that the stipulation was more than an agreement to postpone the settlement of the bill of exceptions. The testimony returned also shows that department two, on the said first day of February, denied the motion to vacate the former order. This was proved by a witness, who swore to the fact. His testimony was objected to as "irrelevant and immaterial." It was relevant and material, and no objection was made that it was *incompetent*. Moreover, the minutes of the court show that department two did deny the motion on the day named.

The present proceeding is an application that the name of the respondent, R. E. Houghton, esq., be stricken from the roll of attorneys and counselors of this court, and that he be precluded from practicing as such attorney and counselor in all the courts of this state: Code of civil procedure, 299. The accusation is that in the affidavit filed in this court, and so as aforesaid used in and before department two, the respondent, for the purpose of misleading and deceiving the justices composing said department, falsely swore that Stetson & Houghton, R. E. Arick and J. W. Freeman, esqrs., had, as the representatives of the several parties mentioned in said proceedings for the settlement of the bill of exceptions, stipulated that said bill of exceptions should be settled on a certain day before the hon. W. W. Cross; whereas, in truth and in fact, the only stipulation in said proceeding actually made by the persons named, was, and is, the stipulation herein before set forth.

And the accusation further specifies that on the occasion when said affidavit was read before department two, respondent, for the purpose of deceiving and misleading the court, in response to a suggestion that the stipulation referred to was only a stipulation to continue the hearing of the settlement, stated and declared that the same was not for a continuance merely, but was as stated in said affidavit. Respondent did not produce the stipulation before department two, but there and then averred that the same was on file with Judge Cross, at Visalia.

If there had been any question of the personal qualifications of the hon. W. W. Cross to settle the bill of exceptions, such objection would have been waived by the stipulation to continue the hearing before him. No such objection was made at any stage of the proceedings; on the contrary, there is no dispute, but he was eminently a proper person to whom to refer the matter. So, if no notice of the hearing before Judge Cross on the twenty-sixth of January, had been served on any of the parties, or the notice was for any reason defective, the stipulation of the twenty-first January, would have precluded a party to it from objecting to the sufficiency of the notice. But if the stipulation, instead of being worded, as, in fact,

it was worded, had been in exact terms "that said bill of exceptions shall be settled by the hon. W. W. Cross, on February 2, 1884," no greater effect could be given. Nothwithstanding such stipulation, department two would have vacated the order referring the matter of the settlement to the hon. W. W. Cross, if it appeared the matter ought not to have been referred to any person. No stipulation could give Judge Cross jurisdiction. His jurisdiction was derived exclusively from the order of the supreme court, and he was subject to deprivation of the jurisdiction by the supreme court, at any time before he completed his duty under the order.

As a stipulation "that the bill of exceptions should be settled by the hon. W. W. Cross," would have given Judge Cross no *power* to settle the bill, as against an order of this court setting aside the order appointing him for that purpose (in this respect having no more effect than the stipulation actually executed), and as the opportunity and power to make the stipulation itself was derived from the order of this court, a stipulation so purporting to submit the settlement to Judge Cross would have been referred to the order, and held to be a submission in accordance with the order of the supreme court. Such a stipulation, therefore, would not have been an answer to the motion to vacate the order authorizing Cross to settle the bill of exceptions. A stipulation, such as the affidavit alleges was made, could have no greater effect or influence on department two of this court—so far as the disposition of the motion to vacate the former order is concerned—than the stipulation actually entered into by the parties. The application to vacate the former order was based on the ground that the order had been inadvertently entered, or rather that the order had been entered without knowledge on the part of the court of certain facts, as that the petitioner had been removed from his office of guardian, etc. Whether the statement in the affidavit as to the contents of the stipulation induced the department two to deny the motion for the vacation of the order appointing Judge Cross to settle the bill, is a matter resting in the memory of the justices who compose the department. We are assured it had no such influence, and are convinced it ought not to have had.

But this does not relieve the respondent of the charge of moral delinquency, if the affidavit was willfully false in that it was deliberately intended to produce a false impression. The question is not whether department two was actually misled by the statement in the affidavit; rather—is the statement false, made for the purpose of deceiving the court. Although it be conceded that in its legal effect, and in so far as it could effect any point then and there to be decided by department two, the statement as to the stipulation contained in the affidavit was the same as if the exact language had been recited. Yet, a statement that the parties had agreed the bill should be settled by the hon. W. W. Cross is not in all respects the equivalent of a statement that, by stipulation, a matter already set for hearing before Judge Cross had been continued to another day.

The statement in the affidavit conveys the idea of the selection of Judge Cross by the parties to the stipulation. It might have operated as a sufficient reason for inducing department two to deny the motion to vacate the former order had the motion to vacate been based, not on the ground of inadvertence or want of information when the former order was made, but on some objection merely personal to Judge Cross. It was a declaration, under oath, which could not have deceived the court, not because it did not vary from the exact truth, but because its legal effect was the same as the exact truth.

It is urged, however, that the averment in the affidavit, admitting it to be verbally inaccurate, was in that respect made inadvertently; that the averment, so far as it bore on the issue then tried, was legally of the same effect as if the very words of the stipulation had been recalled, and that it cannot be supposed the respondent was ignorant (or believed the court ignorant) that the mere fact that parties had stipulated that Judge Cross should settle the bill would be no answer to the motion to vacate; that it cannot be presumed a lawyer of conceded intelligence and learning would have willfully stated a falsehood so easily exposed by the production of the stipulation.

It is further urged that the real purpose for which the affidavit was made and read is apparent from an examination of the motion papers. From such examination respondent claims it is seen that the fact deemed material by the affiant was the fact that R. E. Arick, esq., the attorney for the administrator, had stipulated to a postponement of the settlement of the bill of exceptions by (or before) Judge Cross. That from that fact, respondent might argue that Messrs. Flournoy, Mhoon and Flournoy ought not to be heard by department two of this court, on a motion to set aside the order previously made; that the fact of the appearance and consent of Arick, and not the precise wording of the stipulation, was the fact to which the attention of the respondent was directed when he prepared, subscribed and swore to the affidavit.

A judgment against the respondent will deprive him of personal and property rights. Unless we are clearly satisfied of respondent's guilt, we ought not to remove or suspend him from the practice of his profession. As we are not so satisfied, we decline to strike his name from the roll. We feel bound to remark that it is always somewhat dangerous to swear to the "legal effect" of a matter in the form of a positive averment. It is certainly less hazardous to give the language of a written instrument, or (if the instrument is lost or beyond the affiant's control) to state that the exact language is not remembered, and to give the substance of the language; that is, to use language which conveys the precise idea expressed by the words contained in the instrument. The facile and ready method of meeting an issue by affidavit of an attorney in the action or proceeding is not to be encouraged. The present proceeding will have subserved a useful purpose if it shall have a tendency, in any de-

gree, to bring about a discontinuance of the frequent and unnecessary manufacture of affidavits; a practice to which resort is had too often carelessly, and sometimes, we fear, recklessly.

The application for the disbarment of respondent is denied.

MYRICK, J., ROSS, J., MCKEE, J., MORRISON, C. J., and THORNTON, J., concurred.

No. 7,883.

BUTCHER *v.* VACA VALLEY RAILROAD COMPANY.

In Bank. Filed September 26, 1885.

NEGLIGENCE — RAILROAD — FIRE ESCAPING FROM LOCOMOTIVE — DAMAGES CAUSED BY SPREADING FIRE.—Whether the fact that a fire, negligently started in the field of one man, and extending to that of another, would establish *prima facie* that the damage done in the second field was an ordinary and natural result of the defendant's negligence, not determined. That is a question to be determined by the jury, in view of all the circumstances proved. Such damage might be an ordinary and natural consequence.

THE SAME—EVIDENCE OF ORIGIN OF FIRE—VARIANCE.—In an action against a railroad company to recover damages for fire, caused by sparks which it negligently permitted to escape from its locomotive, evidence that the fire commenced on land adjoining that of the plaintiff, and extended to his lands, is admissible under an allegation that the fire from the defendant's locomotive "was suffered to escape, and did escape, and by reason thereof, came upon the land of the plaintiff."

THE SAME—EVIDENCE OF LIKE FIRES ADMISSIBLE.—On the trial of such action, a witness may testify that shortly after the fire complained of, at a place from a quarter to one-half a mile distant, he saw a fire in a field near the defendant's road, just after a train of cars had passed, drawn by the same engine from which, as claimed, the fire escaped which caused the damage sustained by plaintiff.

THE SAME—PRESUMPTION OF NEGLIGENCE—FAULTY CONSTRUCTION OF ENGINE.—In such a case, a presumption of negligence is raised if it appear that the engine from which the fire escaped, was not built so as to retain its sparks; or was otherwise of faulty or insufficient construction; and evidence that shortly after the fire, certain repairs were made on the spark-retaining apparatus of the engine, is admissible to show that it was so built.

APPEAL from a judgment of the superior court of Solano county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts. The opinion in department is reported in 5 West Coast Rep., 151.

Jos. McKenna, for the appellant.

G. A. Lamont and *W. Van Dyke*, for the respondent.

MCKINSTRY, J. No exception was taken to any portion of the charge of the court to the jury.

The complaint alleges that on a certain day the defendant was engaged in running its trains on its railway, "and while so engaged, by reason of the carelessness and negligence of said company, and the engineers and employees thereof, the fire from the engine and locomotive of said road was suffered to escape, and did escape, and by reason thereof, *came upon the land of the plaintiff* herein, and consumed," etc. There was evidence to prove that the fire commenced on the land of one *Wilson*, and from thence spread and extended to the land of plaintiff.

The defendant, in due form, and at the proper time, objected to any evidence "being admitted under these pleadings which tends to

establish, show or indicate any other initial point of the fire than that alleged in the complaint." The objection is that there is a substantial variance between the averment of the complaint and the evidence offered.

The averment is that the fire, having escaped, "came upon the land" of the plaintiff, and consumed and destroyed his crop. We are not prepared to say that the mere fact that fire, arising out of the negligent act of a defendant, on the premises of one proprietor has extended to the premises of another, always and necessarily gives a cause of action to the latter. As was said in Henry v. S. P. R. R. Co., 50 Cal., 182: "It is said that the nonsuit should have been granted, inasmuch as the fire was not kindled in plaintiff's field, but in the field of one Cagney, an adjoining proprietor, from which it extended to the field of the plaintiff.

"The legal proposition involved in the foregoing statement is that, if by negligence a fire shall commence on the premises of one proprietor and spread from thence to those of another, the latter shall never have his action against him guilty of the negligence. We think this proposition cannot be maintained. To refute it, it is not necessary to establish the counter proposition that the adjoining proprietor thus injured shall always recover.

"It may be assumed, perhaps, that a city fire which has its origin in one building will not ordinarily extend throughout a block, and yet a jury may be justified in saying, when a fire is started in a field which constitutes a portion of a larger tract of dry grass, or corn fully ripe, that it will usually be driven into another field, from which the first is separated only by a fence of boards. It is a rule, applicable to all cases of mere negligence, that the wrongdoer is liable for the proximate, and not for the remote, consequences of his default. A long series of judicial decisions has defined proximate, or immediate and direct, damages, to be the ordinary and natural results of the negligence, such as are usual, and as, therefore, might have been expected; and this includes in the category of remote damages such as are the result of an accidental or unusual combination of circumstances, which would not be reasonably anticipated, and over which the negligent party has no control. In Ryan v. N. Y. C. R. Co., cited by appellant's counsel, the court held, when a railroad company negligently set fire to its own woodshed, and the sparks communicated the fire to and destroyed the house of another proprietor one hundred and thirty feet from the shed, that no cause of action existed in favor of the owner of the house: 35 N. Y., 210.

"In that case no new principle was involved. The learned judge who delivered the opinion placed the decision on the ground that the burning of the house was not to be expected from the first firing: See Webb v. R. W. & O. R. Co, 49 N. Y., 420. It would be strange if, among the numerous cases in which resort has been had to the rule of the law of negligence to which we have referred, courts had not differed in their application of the rule; but for the purposes

of this action it may be admitted that the rule was properly applied in Ryan's case. We are still confident, considering the long, dry season of California and the prevalence of certain winds in our valleys, that it may be left to the jury to determine whether the spreading of a fire from one field to another is not the natural, direct or proximate consequence of the original firing."

It is laid down by Shearman and Redfield: "One who * * * by want of ordinary care sets fire to land which does not belong to him is responsible for all the proximate consequences of his act, not only to the owner of the land on which the fire begins, but also to the owner of any other property which the fire may reach in its spread:" On Negligence, 330. But the case referred to by them, Finley v. Langston, 12 Mo., 120, merely holds that (under a statute which declared that whoever willfully sets on fire a prairie or woods, and that fire occasions damage to another, shall be liable to a certain penalty) a defendant was liable who started a fire on *his own* premises, which extended to those of his neighbor.

It is not necessary here to decide that the mere fact that the fire commenced in the field of one man and extended to another would establish, *prima facie*, that the damage done in the second field was an ordinary and natural result of the defendant's negligence. That was a matter to be determined by the jury in view of all the circumstances proved. It is enough to say such damage might be an ordinary and natural consequence. It will be observed that no objection was made to the sufficiency of the complaint by demurrer, or otherwise. There is no suggestion that the mere statement in the complaint of facts, tending to prove that the injury done to the plaintiff was caused by the negligence of the defendant, is not a direct averment that defendant set fire to the plaintiff's crop, or that the destruction of his crop was the direct consequence of the negligence of defendant. If the complaint was defective, we think the defect was cured by verdict.

The averment is that the fire started by the defendant came to plaintiff's land. This is not an allegation that it began on his lands, and we think the averment was sustained by evidence, that it came to his lands from the lands of another. The precise objection of variance was not well taken.

In Henry v. S. P. R. R. Co., *supra*, the court also said: "We think there was no error in permitting proof that prior and subsequent to the fire which produced the injury complained of, other fires were kindled by defendant's engine. The evidence was confined to fires caused by the same engine, in the same vicinity and about the same time."

At the trial of this cause, a witness, Sherman Marshall, was permitted, notwithstanding the objection of defendant, to testify that about two weeks after the fire which is alleged to have burned the plaintiff's property, at a place from a quarter to one half mile distant from the spot where the fire in question here was kindled, he saw fire in a field near the defendant's road, just after a train of cars

had passed drawn by the same engine from which, as claimed, the fire escaped, which caused the damage sustained by plaintiff.

Evidence that sparks and burning coals were frequently dropped by engines passing upon the same road upon previous occasions, has been held to be relevant and competent to show negligence and to make it probable that the plaintiff's injury proceeded from the same quarter: Shearman and Redfield, 333; Field v. N. Y. Central, 32 N. Y., 339; Sheldon v. Hudson River, 14 Id., 218; Henry v. S. P. R. R. Co., *supra*. So, evidence that sparks have frequently been carried by the wind, etc: Sheldon v. Hudson River, *supra*; Piggott v. Eastern Counties, 3 C. B., 229. As was said in Henry v. S. P. R. R. Co.: "Evidence is admissible if it is a circumstance which, with other circumstances, may bring home to the mind a conviction of the main matter in issue. There may be difficulty in many instances in drawing the line of separation between evidence which thus tends to establish the issue, or from which, in accordance with ordinary experience, a reasonable inference may be drawn as to the principal matter in dispute, and evidence of facts simply collateral. The last class of evidence is not admissible: 1 Greenleaf on Evidence, 448."

In the aspect of the case most favorable to defendant, there is no evidence in the record that the fire which caused the destruction of plaintiff's crop was caused by defendant's engine, other than the fact the fire commenced, or was seen, very soon after the engine passed, and that a high wind was blowing. As an inference from these facts, considered with or without reference to evidence as to the character of the engine, its management, etc., the jury may have been authorized to find that the engine caused the fire. Conceding evidence that engines of defendant communicated fire to other property, on other occasions, would tend to show negligence, and to render it more probable that the fire was, in this case, so communicated, can facts, from which a similar inference might be drawn, give greater force to the *inference* that the fire which destroyed the plaintiff's property came from the defendant's engine, because the engine had just passed and a wind was blowing? The witness did not swear that, on the occasion to which he testified, he saw sparks issuing from the smokestack. Certainly such evidence approximates very closely the line which separates evidence merely collateral and independent from evidence bearing upon the issue made by the pleadings.

It may be said to be an attempt to add to a probability by another probability; to support an inference by an inference. Yet, if it is permissible by direct proof to show that other fires were caused by defendant's engines, is it not permissible to show facts tending to prove that other fires were so caused? If many fires had occurred along the line of defendant's road, under circumstances like those appearing in the present case, the fact would have tended to prove negligence in the management of defendant's business, and that this particular fire was started by sparks from the locomotive.

Proof of a single fire should have much less weight than proof of many fires, but we can not say it was absolutely irrelevant.

The defendant moved for a nonsuit on the ground that plaintiff had given no evidence of negligence. In some of the states (Maine, Massachusetts, New Hampshire) railroad companies are made by statute absolutely liable for injuries caused by fire proceeding from their engines, irrespective of their negligence: Shearman and Redfield on Negligence, 334. Our attention has been called to no such statute of this state.

In the absence of statute, the rule is that, inasmuch as railroad companies, authorized by charter to use steam power, have necessarily the right to use fire as a means of generating steam, and are, therefore, not liable for fires unavoidably produced by keeping fire for such a purpose. "One who seeks to recover on account of injuries caused to property by sparks, smoke or coal escaping from a locomotive, the use of which is authorized by law, must prove some negligence apart from the mere fact of injury," etc.: S. & R., 332. It has been said, however, that the plaintiff may rely upon a presumption as evidence of negligence. In the opinion of the learned writers already quoted, the rule most just and sustained by the best authorities is: "The origin of the fire being proved, it rests upon the defendant to show that it used all necessary precautions to avoid doing such mischief. The natural presumption would be that, by the use of ordinary care, engines could be constructed so as to avoid such consequences; and, if that is so, a presumption of negligence arises from their not being so constructed:" Sec. 333.

In the case at bar, it is not necessary, however, to appeal to the presumption of negligence mentioned by Shearman and Redfield.

Even where that doctrine has been denied, "it is held that a presumption of negligence is raised by evidence that engines can be, and are sometimes, so made as to retain their sparks:" Id.

In Hull v. Sacramento Valley Railroad Company, 14 Cal., 387, it was held, the fact that fire was communicated from defendant's engine to plaintiff's grain, with proof that this result was not probable from the ordinary working of the engine, was *prima facie* proof of negligence, sufficient to go to the jury. And so it was decided by the supreme court of North Carolina that, although the position is not tenable, that whenever damage is done the law implies negligence, yet when plaintiff shows damage resulting from the act of the defendant, which act, with the exertion of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence: Herring v. W. & R. Company, 10 Iredell, 402; and see, also, Piggott v. Eastern Counties Railroad Company, 3 C. B., 228.

In the case before us the plaintiff proved by the witness A. J. Stevens, the general master mechanic of the Central Pacific Railroad Company, that a perfect engine, properly equipped and properly run, will not ordinarily throw out sparks sufficient to start a fire.

The plaintiff also proved by Joseph Erhart, the engineer in charge of the engine when the fire occurred, that a little more than two

weeks afterwards some repairs or changes were made by defendant in the engine.

At the time of the fire the trap door, for opening into the smokestack, had two nettings one inch apart. One of these was removed to the top of the smokestack. This testimony was objected to on the ground that it was immaterial and irrelevant. We cannot say the evidence was totally irrelevant.

It might fairly be argued that more sparks would issue from the smokestack before the change. The valve being opened and the draft increased, live cinders lying between the two nettings, one inch apart, might be forced beyond the upper netting. In such case it might be argued that more sparks would escape from the stack than if there was a larger space between the two nettings in which the cinders or sparks might die out.

The plaintiff also gave evidence tending to prove that the Vacaville, the locomotive in question, was a small, light engine, not more than half the weight of engines ordinarily employed, and that opposite the place where the fire commenced, it was pulling a long train up a "grade." That "she had to exert herself to pull much of a train." That an engine with short flues is more liable to throw fire through the smokestack than one with longer flues—the fire having less distance "to travel." That there was a curve near the place where the fire destructive to plaintiff's property occurred, which increased the pull up the ascent, and that when attacking a grade it was usual to give more steam, the effect of the exhaust being to increase the draft. We think there was sufficient evidence of negligence to send the case to the jury.

The plaintiff having made out his case *prima facie*, it remained for the defendant to overcome it by showing that it had used all reasonable care and diligence in securing a proper engine, and in the management of it, to prevent the happening of fires. Taking the whole case as presented by the parties, there was a substantial conflict of evidence, with respect to the issue of negligence, and, in accordance with the established rule, we are not authorized to set aside the verdict.

Judgment and order affirmed.

MYRICK, J., MORRISON, C. J., THORNTON, J., and MCKEE, J., concurred.

No. 9,748.

CAMERON, EXECUTOR, ETC., v. CARROLL.

Department One. Filed September 26, 1885.

DEFAULT JUDGMENT—ABSENCE OF ATTORNEY—SETTING ASIDE DEFAULT—DISCRETION.—It is no abuse of discretion for a court to set aside a judgment for the defendant, rendered in the absence of the plaintiff and his attorneys, who resided at a distant place, and who had reason to believe that the case would not be tried at the time it was taken up.

APPEAL from an order of the superior court of Sacramento county, setting aside a judgment. The opinion states the facts.

Robt. T. Devlin, for the appellant.

Chipman & Garter and *Beatty & Denson*, for the respondent.

BELCHER, C. C. This is an appeal from an order setting aside a judgment rendered in the absence of the plaintiff and his attorneys. The motion to set aside the judgment was made under section 473, code of civil procedure, and was granted on condition that the plaintiff pay to the defendant the sum of one hundred dollars within ten days. The defendant excepted. The only question is, did the court abuse its discretion in making the order?

After reading the affidavits presented we cannot say that there was any abuse of discretion. The case was at Sacramento and the plaintiff's attorneys resided at Red Bluff and supposed, and we think not without reason, that the case would not be tried at the time it was taken up: McKinley v. Tuttle, 34 Cal., 235.

"The exercise of the mere discretion of the court ought to tend, in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application:" Watson v. S. F. and H. B. R. R. Co., 41 Cal., 20.

The order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

No. 9,862.

FRESNO ENTERPRISE COMPANY *v.* ALLEN ET AL.

Department One. Filed September 26, 1885.

SURETIES—PRIVATE BOND FOR CORPORATE OFFICER—TIME FOR WHICH GIVEN.—On the fourth of June, 1881, the defendant Allen was appointed by the board of directors of the corporation defendant, its secretary, to hold his office for one year, and until his successor should be elected and qualified. On September 1, 1881, a bond was executed by the defendants, conditioned that if the said Allen "shall duly preserve and keep all such funds as may come under his control or into his possession, and pay over to said company all such funds as he may not pay out in due and lawful course of business, then his obligation to be void, otherwise to remain in full force." By the by-laws of the corporation the board of directors were empowered to appoint and remove at pleasure all officers, agents and employees of the corporation, fix their tenure of office, etc. At the annual election of officers in June. 1882, Allen was re-elected secretary until the further order of the board. In an action on the bond, to recover for a defalcation occurring subsequent to December, 1882, *held*, that the defendants were not liable; that the bond expired upon the end of the term for which it was given, to wit, on June 4, 1882, when a successor was elected; and that this result was not affected by the fact that Allen was elected as his own successor.

IF THE SURETIES ON SUCH BOND ARE NOT LIABLE the principal is not.

APPEAL from a judgment of the superior court of Fresno county, entered in favor of the defendant. The opinion states the facts.

James Grant and *Wallace & Hastings*, for the appellant.

Garber, Thornton & Bishop, for the respondents.

McKINSTRY, J. The action is on a bond executed by the defendants, and which is in the words and figures as follows:

"Know all men by these presents, that we, William H. Allen, as principal, and James E. Bowe and John Haley, as sureties, are held and firmly bound to the Fresno Enterprise Company, in the penal sum of ten thousand dollars, to the payment of which we bind ourselves and each of us.

"Given under our hands and seals, the first day of September, 1881.

"The condition of this obligation is such that whereas, William H. Allen is secretary of the Fresno Enterprise Company, and, as such, has, or may have the custody of the moneys of said corporation, now, if said William H. Allen shall duly preserve and keep all such funds as may come under his control, or into his possession, and pay over to said company all such funds as he may not pay out in the due and lawful course of business, then this obligation to be void; otherwise, to remain in full force.

"(Signed): "WM. H. ALLEN. [SEAL.]
"J. E. BOWE. [SEAL.]
"JOHN HALEY. [SEAL.]"

The complaint is:

1st. On the fourth day of June, A. D. 1881, William H. Allen was appointed by the board of directors of said Fresno Enterprise Company, secretary of said corporation, to hold his office for one year, and until his successor should be elected and qualified; that by the by-laws of said company the board of directors were empowered to appoint and remove at pleasure all officers, agents and employees of the corporation, fix their tenure of office, prescribe their duties, fix their compensation, and require security for faithful service.

2d. That at the annual election of officers, in June, 1882, no successor to said Allen was elected, but he was continued as secretary until the further order of the board. A successor was elected and qualified in June, 1883.

3d. That after said Allen's election, and about the first of September, 1881, said Allen as principal, and said Bowe and Haley, as his sureties, executed and delivered to said company their joint and several bond or writing obligatory for the payment to said corporation of the sum of ten thousand dollars; and said bond had a condition thereunder written, which recited: "That, whereas, said Allen is secretary of the Fresno Enterprise Company, and, as such, has or may have the custody of the moneys of said corporation, now if said Allen shall duly preserve and keep all such funds as may come under his control or into his possession, and pay over to said company all such funds as he may not pay out in the due and lawful course of business, this obligation to be void; otherwise, to remain in full force."

And for breach of condition of said writing obligatory, the plaintiff says that on the twenty-fifth day of December, 1882, and on divers days and times between that day and the first of May, 1883, the said

Allen received and had in his possession, of the moneys of said company, the sum of forty-five hundred dollars and sixty cents, which he has neglected and refused to account for and pay over to the treasurer of said company, the proper officer to receive the same, and; upon demand made, neglects and refuses to account for or pay over the same to the proper officers of said company; that said Allen, as secretary, was the custodian of said bond, and has refused to deliver the same to his successor in office, and has lost or destroyed the same.

The plaintiff tenders to the defendants such indemnity for the loss of said bond as this court may require, and annexes hereto a substantial copy thereof, marked exhibit "A."

4th. By reason of the premises, the said defendants, each of them, have become liable, and are bound to pay to said plaintiff the said sum of forty-five hundred dollars and sixty cents, with interest from the first of May, 1883, for which sum, with interest and costs, the plaintiff asks judgment.

The court below sustained a demurrer to the complaint, on the ground that the same shows the defendants are not liable on the bond for any part of the moneys mentioned in the complaint, because it appears from said complaint that said moneys were not received, or in the possession of said William H. Allen, "prior to the twenty-fifth day of December, 1882."

Official bonds are to be construed with reference to the *statutes* bearing on them, and the liability of the obligors on such bonds has been considered very fully in several cases in this court, notably in Hubert v. Mendheim, 64 Cal., 213. But, as was said in that case, in reference to bonds given to individuals and private corporations, "such matters are the subject of private contract, by which the parties may bind themselves in any manner, or to any extent, not violative of public policy or positive statute." These private contracts are to be interpreted, like other private contracts, with reference to their language and the circumstances under which they were entered into.

On the fourth day of June, 1881, the defendant, William H. Allen, was appointed by the board of directors of the corporation, plaintiff, secretary, "to hold his office for one year and until his successor should be elected and qualified," but subject to and in view of a by-law of the company, which provided that the board of directors should have power to remove at pleasure all officers, agents," etc.

The obligors knew when they executed the bond that William H. Allen would continue as secretary until June 4, 1882, unless he was sooner removed by the board of directors. They knew, also, that he might continue to serve after the fourth of June, 1882, and until his successor should be "elected and qualified." It is difficult to give any meaning to the word "qualified" in the connection in which it is used. It does not appear that by the charter or by-laws the secretary was obliged to take an *oath* (passing the circumstance that such an oath, if required simply by a by-law, would be extra judi-

cial), or that the charter or by-laws required the secretary to give bond.

Yet a particular secretary could be required at any time to give bond as a condition to his retention of the office, and if the defendants voluntarily executed the instrument sued on, it was executed and delivered for a sufficient consideration. By its terms they were bound for the safe keeping and proper disposition of the company's money which came into William H. Allen's hands. During what period? Up to the fourth of June, 1882, unless he should be removed, and until his successor should be elected or appointed. It is true the principal obligor did not have a vested right in the office for a definite period. But it is clear the contract was made with reference to the term to expire on the then next fourth of June, or when the successor should be named. The term was for a definite time, not rendered entirely indefinite by the circumstance that the directors expressly retained the right to remove in the meantime; a right to dismiss for sufficient cause would have been implied had it not been expressly reserved. There is no averment in the complaint that by the by-laws or charter the secretary's term of office is one year, or one year and until, etc., but only that the defendant was so appointed. His successor might be appointed to hold at the pleasure of the appointing power simply.

If another person had been so appointed at the expiration of the year, there would remain no doubt that on such appointment being made and the office turned over to the appointee, the liability of the obligors would have ceased as to time. William H. Allen could be and was appointed his own successor. In June, 1882, he "was continued as secretary until the further order of the board." The complaint avers that no successor was appointed, but the averment goes for naught if the order of the board was such appointment. The bond was executed with reference to the possible continuance of the defendant as secretary to June 4, 1882, and for a reasonable time beyond within which a successor might be nominated. It is claimed that the order of the board "continuing William H. Allen as secretary" had no greater effect than their silence would have had, and if they had not acted, he would have continued as secretary until his successor was appointed or he was removed. It may be doubted whether the plaintiff could render the defendants liable on the bond for any period by merely omitting to name a successor. But here, his term having expired, the directors reappointed Allen.

The bond in suit does not provide, as does the bond in some of the cases cited, that the obligors shall be responsible for malfeasance of William H. Allen "during the time he shall continue secretary" or "while he shall continue to act as secretary" or other like words. The recital is: "Whereas William H. Allen *is* secretary," etc. Surely the obligors (sureties) did not inteud to bind themselves to answer for all defalcations of their principal, which might happen during his natural life, in case he should be reappointed and act as secretary for the rest of his life.

Is that the meaning of their contract, fairly interpreted? They were not compelled to anticipate that some other person than Allen would by appointed at the expiration of Allen's term.

Counsel for appellant concede that if, by the charter of the company or laws of the state, the office of Allen was limited to one year, the defendants would not be liable beyond the year; and that when the bond is general but the period of the office limited by the by-laws of the company, the sureties are not liable for a default after the expiration of the limited time: Welch v. Seymour, 28 Conn., 387; Chelmsford v. Demarest, 7 Gray, 1; South Carolina v. Johnson, 1 McCord, 41.

But it is contended that when "the tenure of office is until his successor is elected or qualified, or accepts—which may be a sufficient qualification—then the sureties are bound for a default occurring at any time before the principal is succeeded, or, in the words of this court in 45 California, when (while) he is yet 'in office.'"

The case in 45 California referred to by counsel, Placer County v. Dickerson, 45 Cal., 13, was an action on a county treasurer's bond. Dickerson was elected treasurer, to hold from the first Monday of March, 1866, to the second day of March, 1868. He continued in office until the third day of March, 1868, when he turned over the books, vouchers, moneys, etc., to his successor, who had demanded them the previous day. There is no pretense that his successor began to act as such, or had assumed the office on the third of March, when the defalcation occurred. It occurred while Dickerson assumed to act as treasurer, under his election prior to the commencement of his term. The facts in that case were different from those in the present.

In this case, William H. Allen was reappointed—named as successor. The argument always returns to the question, "What does the contract mean?" It was the apparent intention of both parties that at the expiration of his year (if he was not sooner removed) some one should be named to succeed Allen as secretary, upon whose appointment the liability of the obligors should cease, so that they should not be responsible for subsequent acts of the secretary. The plaintiff performed its duty in the premises by appointing Allen as his own successor. When he began to act under the reappointment the liability of defendants on the bond ceased. As we have seen, it does not appear that the charter or any by-law fixed the term of secretary at one year or any definite term.

The directors had power to appoint a secretary to hold until the further order of the board.

The liability of the defendant, William H. Allen, on the bond is no greater than, nor is it different from, that of the other defendants. Of course, he is liable in a direct action for moneys of the plaintiff he has misappropriated. But the liability of each of the defendants who executed the specific contract is the same.

A principal in a bond is no further bound than his sureties: Bigelow v. Bridge, 8 Mass., 274.

Appellant's counsel suggests: "Suppose a principal forged the name of a surety. The surety would not be liable, but the principal would be." In that case the principal would be liable, because he executed the bond; the alleged surety would not be liable, because he did not execute it.

Judgment affirmed.

ROSS, J., and MCKEE, J., concurred.

No. 8,445.

WRIGHT v. CENTRAL CALIFORNIA COLONY WATER COMPANY.

Department One. Filed September 28, 1885.

CORPORATIONS—ELECTION OF DIRECTORS—ACTION TO SET ASIDE—STOCKHOLDER MAY MAINTAIN.—A stockholder in a corporation may institute an action to set aside an election for directors, although he has not had stock standing in his name on the books of the company for a sufficient length of time to entitle him to vote at such election, under section 312 of the civil code.

THE SAME—SUPERIOR COURT HAS JURISDICTION OF ACTION.—The superior court, sitting as a court of equity, has jurisdiction to inquire into the validity of an election for corporate directors, and to set it aside, if it was not made in conformity with law, although such jurisdiction has not been expressly conferred upon it by statute.

THE SAME—MANNER OF VOTING AT ELECTION—RIGHT OF CUMULATIVE VOTING.—Under section 12 of article xii. of the constitution, each qualified stockholder, present at an election for directors of a corporation, has the right in exercising his power of voting for directors, to vote, at one time, the whole number of shares in his name, for the whole number of directors to be elected, or to cumulate his shares by voting for one candidate for director as many votes as shall equal the number of his shares, multiplied by the number of directors to be elected, or by distributing them, upon the same principle, among as many candidates for directors as he shall think fit. And an election at which the stockholders are denied the right to thus cumulate their votes is illegal and will be set aside.

APPEAL from a judgment of the superior court of Fresno county entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Campbell & Goss, for the appellants.

Stuart S. Wright and *W. Barry*, for the respondent.

MCKEE, J. This was a proceeding to set aside an election for seven directors of the Central California Colony Water Company—a corporation organized and existing under the laws of this state, having a capital stock of thirty thousand dollars, divided into one hundred and ninety-two shares of stock of the par value of one hundred and fifty-six dollars and twenty-five cents each.

It is claimed that the petitioner was not qualified to inaugurate the proceeding to set aside the election, because he was not a *bona fide* stockholder, having stock in his own name on the stock books of the corporation, at least ten days prior to the election; and that the court did not find on that issue.

But there was no such issue joined in the case. The petitioner merely alleged that he was a *bona fide* stockholder at the commencement of the proceeding. Of this allegation there was a denial; and, upon the issue raised by the denial, the court finds that the election

for directors was held on the twenty-first of September, 1881, and that on the twentieth September—the day before the election—"the petitioner became a *bona fide* stockholder in said corporation, and has ever since continued to be a stockholder therein, having stock in his own name upon the stock book of the corporation."

That being the fact, it may be conceded that the petitioner was not a qualified elector of the corporation, under section 312 of the civil code, which provides that a *bona fide* stockholder, having stock in his own name on the stock books of the corporation at least ten days prior to the election, is the only person entitled to vote at a corporate election. But while the petitioner may have been disqualified from voting at the election, he was not disqualified from instituting proceedings to set aside the election, if it was voidable; for, by the same section of the code, "any absent or other stockholder" is authorized to institute such a proceeding. Therefore, as a stockholder of the corporation, the petitioner had legal capacity to institute the proceeding commenced on the twenty-ninth September, 1881.

It is urged, however, that, even if the petitioner had the capacity to sue, the proceeding was improperly commenced in the superior court, because section 312, civil code, upon which the proceeding is founded, only authorized the filing of a petition in the district court, to set aside a voidable election; and as, at the time of the commencement of the proceeding, there was no district court, and no law which authorized the filing of such a petition in the superior court, the proceeding was improperly commenced in the superior court.

The constitution of 1879 abolished the district court, but at the same time it created the superior court, and conferred upon it the same equity jurisdiction which had been formerly conferred upon, and was exercised by, the district court. Sitting as a court of equity, therefore, the superior court had jurisdiction to inquire into the validity of an election, and to set it aside, if it had not been made in conformity to law, whether the statute conferred it or not; Brown v. Pacific M. S. Co., 5 Blatch., 525; Walker v. Deveraux, 4 Paige, 225; Webb v. Ridgley, 38 Md., 364. The abolition of the district court did not destroy or affect the right to invalidate a voidable election. The remedy still existed in favor of any one aggrieved, and was enforceable by him in any court of competent jurisdiction of the subject matter.

It is next claimed that the election was valid, and that the court erred in holding it to be invalid. According to the finding of the court, the election was called "pursuant to a notice, which was in all respects published according to law," and at the proper time and place for holding the election a majority of stockholders of the subscribed capital stock of the corporation met, and organized, and proceeded to elect seven directors. The records of the election show:

"After some discussion the following motion was made and seconded: That the stockholders of the Central California Colony

Water Company proceed to the election of officers of the said Central California Colony Water Company in the manner provided in the constitution of said company. Carried, sixty-two to ten."

And the court finds that the manner of conducting the election was this:

"That prior to taking any vote in said election the majority of said stockholders adopted a resolution to the following effect: That seven (7) ballots should be taken for directors; that each stockholder should vote on each of said ballots for one person and no more, and that the person receiving the majority of the votes cast on each ballot should be declared elected director for the ensuing year."

In this way seven separate ballots were taken in succession, and on each ballot the candidate receiving the highest number of votes cast was declared elected a director, until seven directors were chosen.

A large number of stockholders present, including the petitioner, protested against the adoption of the resolution and the manner of conducting the election. And the court finds, as fact, that they "demanded to be allowed to cumulate their respective votes on one or more persons for directors, but that they were not permitted so to do, and were prevented from so doing by said resolution;" and as law, "that the election was not had in accordance with the provisions of article ii., chapter 1, part iv., of the civil code of the state of California, and that said election was, and is, illegal and void."

The decision is predicated upon the fact that the petitioner and others, as qualified voters at the election, had the right, under the charter of the corporation, to cumulate their votes upon any one candidate or distribute them upon two or more candidates; and that they were deprived of this right by the adoption of the resolution and by the manner of conducting the election. Section 12 of article xii. of the constitution of 1879 reads thus:

"In all elections for directors or managers of corporations every stockholder shall have the right to vote, in person or by proxy, the number of shares of stock owned by him for as many persons as there are directors or managers to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit, and such directors or managers shall not be elected in any other manner, except that members of co-operative societies, formed for agricultural, mercantile and manufacturing purposes, may vote on all questions affecting such societies in manner prescribed by law."

This section is understood to confer upon the individual stockholder, entitled to vote at an election, the right to cast all the votes which his stock represents, multiplied by the number of directors to be elected, for a single candidate, should he think proper to do so.

So that the petitioner, as the representative of a single share of stock, if qualified under the charter of the company to vote, was entitled to cast seven votes for any one of the candidates for the office of director, or to distribute them among any two or more candidates. In that way a minority of the stockholders would be enabled to secure representation upon the board of directors by electing one or more of the directors. Such, doubtless, was the object of the provision; and the rule was considered of sufficient importance as to make it part of the organic law.

Under this rule a corporation, holding an election for directors, is bound to follow the constitutional mode. It has no power, by resolution or otherwise, to adopt any other. And when an election for directors has been properly called, each qualified stockholder present has the same right, in exercising his power of voting for directors, to vote, at one time, the number of shares in his name for the whole number of directors to be elected, or to cumulate his shares by voting for one candidate for director as many votes as shall equal the number of his shares multiplied by the number of directors to be elected, or by distributing them, upon the same principle, among as many candidates for directors as he shall think fit.

We think the power thus conferred upon a corporate elector can only be exercised according to the constitutional provision by allowing him to cast his ballot singly, cumulatively or distributively, *at one time* for the election of directors. For if but one director at a time be balloted for, a majority of the stockholders could, by combining, cumulate their votes each time upon a single candidate and elect him, and by thus shaping and controlling the manner of the election, it would be in the power of the majority of the stockholders, to virtually cancel the votes of the minority and deprive them of their rights to representation on the board of directors.

Judgment and order affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

No. 9,911.

LEWIN *v.* HOPPING.

Department Two. Filed September 28, 1885.

TRANSFER OF PERSONAL PROPERTY—CONSIDERATION—FRAUD ON CREDITORS—CHANGE OF POSSESSION.—A transfer of property, in consideration of a promise by the transferee to use it in a certain manner, which would confer pecuniary profit on the transferor, is founded upon a sufficient consideration, and is not fraudulent as to the creditors of the latter, if the transfer be accompanied by an actual, immediate and continued change of possession.

APPEAL from a judgment of the superior court of Shasta county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

W. Taylor and *L. W. Frisbie*, for the appellant.

Edward Sweeney and *Chipman & Garter*, for the respondent.

FOOTE, C. Action of claim and delivery. The plaintiff obtained judgment for the return of a certain wire rope, or its value, which had been seized in attachment by the defendant, as sheriff of Shasta county, at the suit of Cappel and Houston, against one Joseph Waugh.

It appears that the plaintiff, being requested by a large number of the citizens of that county, had raised money by subscription from divers individuals to complete a road to a certain point on the Sacramento river.

That as an incident to that object, and as a part of the scheme, it was found advantageous to establish a ferry across said river at a place where a railroad could be reached, and this was where one Waugh kept a hotel. He possessed a certain wire rope, suitable for such a purpose, and Lewin visited him and proposed to obtain it from him, on his own behalf, and that of these public-spirited citizens, as an aid to accomplish the end in view.

Waugh, for the consideration that his hotel would thereby receive increased patronage from the traveling public, and himself derive pecuniary benefit, and that a boat would be built by Lewin and those he represented, so that a ferry would be established, agreed to let the rope be used as desired by Lewin, and to make a permanent transfer of it for that express purpose. This he at once did, giving a written order therefor to Lewin, who took possession and control of and removed it to a warehouse, and left it there, subject to his disposition. It remained in this situation for nearly a month before it was seized in attachment.

Some days after this transfer, but before the attachment levy, the board of supervisors of Shasta county subscribed three hundred dollars towards aiding in the establishment of the ferry as a free and public one, and made an order upon a petition of certain citizens, asking that such an one be established at that point, that the franchise should be granted as prayed for, but for the convenience of having some individual to take out a license, they gave it to Waugh, although he had not petitioned therefor. Lewin had possession all this time of the rope, and was proceeding to get the ferry ready for use, when the attachment was levied on the property in dispute, and, although he claimed it as his own, it was taken and is still withheld from him, and he instituted this action to recover it.

It is urged by the appellant that Lewin had no title or right of possession to the property, that it was a gift, from Waugh, to unknown persons, and in fraud of the rights of creditors.

The intentions of the parties to this transaction, as gathered from the evidence, was to establish a ferry at a given point, from which mutual benefits would flow to them. Lewin was one of a number of persons who, although their names are undisclosed, it would seem could easily be identified, who, upon their part, had agreed to use their money in building a boat and preparing the other things necessary to carry on the ferry as a free and public one. This agreement being communicated to Waugh, he, because of the promise on their

part to fulfill it, and because he expected to realize pecuniary profit therefrom, transferred to the possession and control of Lewin, for the purpose specified, the custody, control of and property in the rope. To his title and right of possession, no condition, mutual or precedent, was expressly attached, but actual, immediate and continued change of possession was given him of the property, and such possession was maintained up to the time of the levy of the attachment, a period of nearly a month.

According to the testimony of Lewin, which is undisputed, he, for himself and those acting with him, was proceeding with "the erection of the ferry" at the time the defendant made the seizure in attachment.

It would seem, therefore, as if, between Waugh and the plaintiff and those acting with him, the conditions of the transfer were being complied with, that the consideration for it was sufficient, and that there was no fraud or attempt to hinder or delay creditors shown by the record, and that Waugh had parted with his title and right of possession to the property in good faith, and in such manner as to bar him from bringing an action of claim and delivery against the plaintiff.

The findings are sufficient, and are supported by the evidence.

There is no error shown by the record, and the judgment and order should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 9,983.

SHIRLEY ET AL. *v.* BISHOP ET AL.

Department Two. Filed September 28, 1885.

NAVIGABLE STREAM—PUBLIC HIGHWAY—OBSTRUCTING ACCESS TO—INJUNCTION.—A navigable stream is a public highway, and an owner of land bordering thereon has a right of free access to such highway. Such right is a vested right and privilege belonging to him, of which he cannot be deprived without compensation. Any interference with the enjoyment of such right, as by the erection of a wharf, cutting off access to such highway, is a nuisance, and will be restrained by injunction.

APPEAL from a judgment of the superior court of Solano county, entered in favor of the plaintiffs. The opinion states the facts.

J. F. Wendell and *J. & J. C. Lynch*, for the appellants.

L. Mizner and *L. B. Mizner*, for the respondents.

FOOTE, C. Action to prevent the construction of a wharf, and to cause the removal of a portion thereof already constructed.

The plaintiffs recovered judgment, there was no motion for a new trial, and the cause comes to this court on the judgment roll alone.

Upon all material issues made by the pleadings, the findings were sufficient. Among other facts, it appears by the record that the

plaintiffs are the owners of a block of land in the city of Benicia, which is bounded on the east by the navigable waters of the straits of Carquinez.

That, by an act of the legislature of this state, approved March 21, 1868, "a permanent water front of the city of Benicia was established."

That, by said act, the easterly line of lots ten and fourteen of said block of land were declared to be a part of said permanent water front.

That the defendants were attempting to build a wharf out into the straits of Carquinez, which, if constructed, would approach to within about three feet of the easterly line of lots ten and fourteen of plaintiff's block of land, and would run parallel with such line for about sixty feet; would be an obstruction to the free use by plaintiff of said block of land, and permanently interfere with the comfortable enjoyment thereof. It would be a nuisance to the plaintiffs and their said property, and inflict on them serious and irreparable injury.

That the piles already driven by the defendants at the time of the commencement of the action, and of the restraining order issued by the court below, constitute a material interference with the enjoyment by the plaintiffs of their said property, and was, and is, and, if not restrained, will continue to be a nuisance to them and said property.

There was no compensation "first made or paid" plaintiffs for the damages to their said property, as should have been done, in order to meet the requirements of section 14, article i., of the constitution of California: Reardon v. San Francisco, 5 West Coast Rep., 764.

The wharf, if built by defendants as contemplated, would deprive the plaintiffs of ingress and egress to and from their lots and the navigable waters of the state.

On the eastern side of said lots the navigable waters of the straits of Carquinez are a public highway: Pol. code, sec. 2,348.

The free access to that *public water highway* was a *vested right* and privilege that belonged to the plaintiffs, and of which they could not be deprived in the manner claimed as legal in this contention: Pol. code, sec. 2, 919; Schultz v. The N. P. T. Co., 50 Cal., 592; Blanc v. Klumpke, 29 Cal., 156; Sackland v. N. M. R. R. Co., 31 Mo., 181; Gould on Waters, secs. 123, 124, 149, 150, 154, and cases there cited.

If the wharf of the defendants could be built and was allowed to stand, it would preclude the plaintiffs from building any wharf as to sixty feet of their water front, declared such by law, and would prevent ingress and egress of vessels from a wharf previously built by them on another portion of their water front of said block of land, and this effect upon their land, in the absence of all compensation, would, if not prevented, result in injury grievous and irreparable, from which, as threatened, they should have relief. It clearly appears, by the findings, that the defendants were creating a *nuisance*

in the navigable waters of the state: Civil code, sec. 3,479; Blanc v. Klumpke, 29 Cal., 156.

Under the circumstances of this case, it is not legal or equitable to construct and maintain the wharf as contended for by the defendants. It would be in disregard of private rights, and result in great and irreparable damage to private property without compensation, for an *ostensible public use*.

There are other questions which arise, but it is unnecessary to discuss or decide them. It has been our care to examine all of the many authorities cited by counsel on both sides of this controversy which were attainable, and we have read, with attention, their very exhaustive briefs, but we are unable to perceive, in either, anything which seriously militates against the views we have expressed as being conclusive of this case.

The judgment of the court below should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

No. 20,093.

PEOPLE *v.* DEVON.

In Bank. Filed September 28, 1885.

CRIMINAL LAW—SENDING FALSE TELEGRAM—INTENT TO DECEIVE.—Under section 474 of the penal code, a conviction for the crime of willfully sending a false message by telegraph, with intent to deceive, cannot be sustained, if it appear that the defendant had not the slightest idea of deceiving the person to whom the message was sent, and that such person was not deceived.

APPEAL from a judgment of the superior court of San Joaquin county, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

Jas. A. Loutitt and *S. D. Woods*, for the appellant.

E. C. Marshall, attorney-general, for the respondent.

THE COURT. The defendant was convicted under section 474, penal code, of the crime of willfully sending a false message by telegraph, with the intent to deceive the person named in the information.

The testimony clearly shows, without conflict:

1. That the defendant had not the slightest idea he was deceiving the person to whom the message was sent.

2. That the person to whom the message was sent was not deceived.

Judgment and order reversed, and cause remanded to the superior court of San Joaquin county for a new trial.

MCKEE, J., expressed no opinion.

No. 9,801.

PEOPLE v. LA RUE ET AL.

Department One. Filed September 28, 1885.

SWAMP LAND DISTRICT—REORGANIZATION OF DE FACTO—VALIDITY OF REORGANIZED CORPORATION—QUO WARRANTO.—Swamp land, levee and reclamation districts *de facto*, acting as such in good faith and under an attempted compliance with law, may, under section 3,489 of the political code, be united, consolidated and reorganized, so as to form a new corporation in all respects valid; and proceedings in the nature of a *quo warranto* against such new corporation, cannot be extended to an inquiry and determination as to the regularity of the several steps by which such original districts were organized.

RIGHT OF CORPORATION TO HOLD REAL ESTATE PRESUMED.—In the absence of evidence to the contrary, a corporation is presumed to have the right to purchase and hold lands.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

Grove L. Johnson, W. H. Beatty, John W. Armstrong and *E. C. Marshall, attorney general*, for the appellant.

A. P. Catlin, for the respondents.

SEARLS, C. This is an action in the nature of *quo warranto*, to determine whether there is any such corporation as reclamation district No. 407, and whether the defendants Hugh M. La Rue, Samuel Lavenson and William Wilcox, are trustees thereof.

The defendants set up in their answer, that two reclamation districts existed under and by virtue of the laws of the state of California, known and designated respectively as districts No. 89 and No. 215, and that swamp land reclamation district No. 407, was formed under section 3,489 of the political code of the state of California by the *reorganization and consolidation* of said districts 89 and 215.

The cause was tried by the court without a jury, and defendants had judgment, from which, and from an order denying a motion for a new trial, this appeal is prosecuted by the plaintiff.

It was admitted at the trial that defendants were elected trustees of swamp land district No. 407, pursuant to an order of the board of supervisors, and after due notice thereof.

The whole controversy is involved in appellant's third assignment of error, which is as follows:

"The evidence is insufficient to justify the judgment in favor of defendants, because the evidence clearly shows that district No. 407 was formed out of districts No. 89 and No. 215, and that said districts No. 89 and No. 215 were never legally, or at all, organized, and that, consequently, district No. 407 was never legally, or at all, organized, and that, consequently, defendants were claiming to hold an office and to exercise a franchise that never existed."

We think the evidence sustains the assertion that districts No. 89 and No. 215 had gone through the form of organizing, and had for some years acted as swamp land districts—that they were *de facto* corporations, and it seems to be tacitly conceded, though not directly admitted, that there were irregularities in their proceedings which

would have been fatal to their existence in a direct attack on the part of the people.

We shall, consequently, for the purposes of the decision, assume that districts No. 89 and No. 215 were *de facto* corporations, and *were not* corporations *de jure.*

Section 3,489 of the political code provides that "swamp land, levee and reclamation districts formed, organized or erected into districts under special or general laws heretofore or now in force, may reorganize and consolidate in the manner following: Whenever the owners of a majority of acres of land in each of two or more swamp land, levee or reclamation districts shall desire to consolidate and reorganize, they may do so by filing a notice with the county recorder of the county in which the greatest portion of the land of the districts is situated, setting forth that they desire to consolidate and reorganize. The notice must give the exterior boundaries of the said district, the name and number of each of them, the number of acres of land that each contains, and must be signed by the persons owning the majority of acres of land in each district, and shall designate the number of acres owned by each signer in the district in which the same is situated."

The section proceeds further, to make it the duty of the county recorder to record the notice, to make and forward to the state land register a certified copy thereof; whereupon the latter must designate a number for the reorganized district, the same as provided for in original organizations, and thereafter the district so organized shall be under the operation and be governed by the general laws, and all proceedings thereafter shall be the same as in organizing districts upon original petition.

The proceedings for the organization of the present district, under section 3,489 of the political code, seem to have been substantially in accordance with the requirements of that section, and of the general statutes relating to and governing the same, and, unless in this proceeding the regularity of the organization of the original districts No. 89 and 215 may be inquired into, the judgment of the court below should be affirmed.

It has been determined by this court that a reclamation district is a public corporation for municipal purposes: Dean v. Davis, 51 Cal., 409.

Reclamation district No. 407, is either a corporation, or it is not. The whole theory of this action proceeds upon the ground, that districts No. 89 and No. 215, not having been organized as by law provided, had no legal entity, and could not therefore serve as a basis upon which to organize by consolidation a new district, and as a consequence that No. 407, has in the eye of the law no existence.

If it is, and at the time this action was brought, was, a corporation, the action must fail, for its sole object is to determine judicially that there was no such district, and no such offices as those claimed by defendants.

The question of reclamation of the swamp and overflowed lands of the state, is one that has received much attention at the hands of the legislature, numerous statutes bearing upon the subject and having the same general object in view, had prior to 1878, received the sanction of the law making power.

Under these statutes a large number of swamp land districts had been organized, governed by separate and sometimes opposite laws.

The object in every case was, no doubt, to reach the same general result, and to vary the means so as to meet the requirements of different cases and classes of cases. The result of this varied legislation, however, was to so far complicate the system that no general and comprehensive rule could be formulated and adopted, and a multitude of swamp land districts existed, each governed by its own special laws.

To bring all these swamp land districts within the operation of general laws seems to have been one of the objects of the amendment of 1878, embodied in section 3,489 of the political code.

Under that section new districts are created.

It provides for the filing of a notice, and prescribes the contents of such notice and the mode or number of persons by whom it must be signed.

Upon recording this notice and furnishing a certified copy to the state land register, that officer is required to designate a number for the organized district, after which it shall be under the operation of and governed by the general reclamation laws of the state, and all proceedings thereafter shall be the same as though such district was organized upon an original petition.

The statute does not propose any method, or delegate to any officer, authority to inquire into the regularity of the proceedings by which the original districts were formed.

Indeed, it does little more than to adopt the territorial limits of the old districts as the boundaries of the new.

In reason, we can see no objection to the formation of a valid corporation under section 3,489, by consolidating two or more districts existing as such in fact, and entitled to recognition as such by all the world, except the state of California, and by the state even, except in direct proceedings against it, to determine its right to exercise corporate powers.

The object of the law is to promote the formation of corporations for the reclamation of waste lands.

It would seem, from some of the language used in the latter portion of section 3,489, that the legislature contemplated the reorganization and consolidation of districts which had not been legally organized, for it is provided that such reorganization shall not be so construed as to validate such original organization.

"Nor shall any indebtedness or any act of said districts, or the officers thereof, prior to the act of reorganization and consolidation, be legalized by this act."

If valid districts *could not* be created by reorganizing those which were invalid, clearly there could be no reason in providing that such reorganization should not validate the original districts.

The organization of a *void corporation*, or, to be more precise, an attempt to organize a corporation which utterly fails, cannot give a legal status to anything.

It appears as though the law makers contemplated cases in which valid corporations might be created over a district in which irregular and invalid districts had existed, and lest such reorganization should be taken as evidence of approval of the acts and indebtedness of such pre-existing districts, inserted the language therein contained.

It is as though the legislature had said you may reorganize and create valid corporations for municipal purposes by uniting two or more corporations irregularly organized, but in so doing you cannot legalize the original bodies, and this law under which you are permitted so to do shall not legalize any act or indebtedness of the original districts performed or incurred *before* you reorganize.

In saying the previous acts should not be legalized, we think the legislature intended the converse of the proposition should also be true, and that the *subsequent acts* of a corporation formed out of such material as we are considering, should be valid.

And we may ask, why not?

A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world, except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even as against the state, except in direct proceedings to arrest its usurpation of power, it is submitted its acts are to be treated as efficacious.

How, then, stands the case? Swamp land districts No. 89 and No. 215 have never been the subject of a direct attack by the state to arrest their charters, or, what under our law is the same thing, to stay their exercise of corporate functions.

As to those corporations, this is a collateral attack.

We think it should not prevail, and that swamp land, levee and reclamation districts *de facto*, acting as such in good faith and under an attempted compliance with law, may, under section 3,489 of the political code, be united, consolidated and reorganized, so as to form a new corporation in all respects valid, and that proceedings in the nature of *quo warranto* against such new corporation cannot be extended to an inquiry and determination as to the regularity of the several steps by which such original swamp land, levee and reclamation districts were organized.

It was further objected at the trial to the introduction of the petition for the organization of reclamation district No. 407, "that it shows it was signed by the Pacific Mutual Life Insurance Company, a corporation, and there is no proof that the corporation is authorized to hold real estate."

It is said, by Angell and Ames on corporations, at section 110, that "both by the laws of England and the United States, there are several powers and capacities which tacitly, and without any express provision, are considered inseparable from every corporation. Kyd enumerates five of these as necessarily and inseparably belonging to *every* corporation."

In enumerating them, the third in number is the right or power "to purchase lands and hold them for the benefit of themselves and their successors."

The presumption is that the corporation in question had the right to purchase and hold the lands by it represented.

If there was anything in its charter, or the business in which it was engaged or in the law under which it was organized in any manner abridging its rights to hold land, it does not appear of record, hence we deem the objection untenable.

Upon the whole case as presented, we are of the opinion the judgment and order appealed from should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 11,002,

PEOPLE v. LOWDEN ET AL.

Department One. Filed September 28, 1885.

QUO WARRANTO — USURPATION OF CORPORATE FRANCHISE — INSUFFICIENT DENIALS IN ANSWER.—In a proceeding in the nature of a *quo warranto*, to obtain a judgment that the defendants were usurping a corporate franchise, where the verified complaint alleges facts showing the illegality and non-existence of the pretended corporation, the answer must specifically deny the facts alleged, and not merely the legal conclusions drawn from such facts. And an allegation in the answer that the corporation was duly, regularly and legally formed, and that it has continued to act as such, is a mere averment of a legal conclusion, and raises no issue.

THE SAME—BURDEN OF PROOF IS ON DEFENDANTS.—In such proceeding, the burden is on the defendants to show that the corporation was legally formed, and that its existence has been legally extended, and to that end they must set forth in their answer the facts showing such formation and extension.

THE SAME—PRIOR PROCEEDING WHEN NOT A BAR TO ACTION.—An application for a writ of mandate to compel a board of supervisors to fix the rates of tolls to be taken on a road claimed by the plaintiff, an alleged corporation, is not a bar to a subsequent proceeding, brought by the attorney general, to determine the rights of defendants to exercise the franchise of such alleged corporation.

THE SAME—ATTORNEY GENERAL MAY MAINTAIN — ESTOPPEL.—The attorney general is not estopped from maintaining such action, by the fact that the person, on whose relation the proceeding is instituted, was, at one time, acting as an officer of the alleged corporation, and was of the individuals who attempted to organize it.

APPEAL from a judgment of the superior court of Trinity county, entered in favor of the plaintiff. The opinion states the facts.

W. J. Tinnin, for the appellants.

J. W. Philbrook, *Jackson Hatch*, and *E. C. Marshall*, *attorney general*, for the respondent.

BELCHER, C. C. This is an action in the nature of *quo warranto*, brought in the name of the people by the attorney general on the information of one Fordyce Bates, to obtain a judgment that the defendants were usurping, intruding into and unlawfully holding a certain franchise to collect tolls under a pretended wagon road corporation.

The defendants demurred to the complaint on the ground that Fordyce Bates was one of the original organizers and owners of the wagon road company and was estopped from making the complaint and from denying the legitimate existence of the corporation he helped to make.

The demurrer was overruled and the defendants then answered.

When the case came on for trial the plaintiff moved the court for judgment on the pleadings, and the motion was granted.

The appeal is from the judgment so entered.

The complaint set forth at length the steps taken to form the supposed corporation, and the various requirements necessary to be observed in forming such corporations, under the statutes which authorized their formation, and then alleged that there was a failure to comply with the requirements of such statutes.

"That all the proceedings hereinbefore set out and referred to touching the formation, organization and establishment of said pretended corporation were wholly fictitious and in bad faith; that nine persons did not sign said declaration of intention to organize such pretended corporation, but that a majority of the names signed thereto, were signed by the persons referred to in allegation numbered two herein, without the knowledge or consent of such persons whose names were so signed; said declaration of intention was never published in any newspaper at all, nor was it ever posted at all; no survey of a route was ever made by Nelson Hosmer, or anybody else, for or on behalf of said pretended corporation; no capital stock whatever was ever subscribed by anybody at all to said pretended corporation, nor was any money at all ever paid into said pretended corporation by anybody at all, nor was any number or valuation of shares of capital stock ever fixed by said pretended corporation, nor was any preliminary organization of said pretended corporation ever made or had, nor was any certificate ever filed as required by said acts, nor was any copy of the original declaration of intention, or a certificate of the election of officers and of the corporate name filed in the county recorder's office of said county."

The complaint further alleged: "That if said pretended corporation ever did have any legal or proper standing, it became, and was, fully and wholly, dissolved in the year 1873, upon the expiration of ten years."

"That defendants have for a year last past been using and exercising all the privileges and rights, and the franchise, of a corporation duly formed, organized and established under the provisions of said acts of the legislature, and duly extended in its duration under section 401 of the civil code of this state, under and by virtue of

said pretended corporation, and have seized and taken possession of a public highway, duly and regularly established, * * * and are collecting tolls from travelers passing over said road, and claim to be the successors in interest of those who took the steps and proceedings hereinbefore set out and referred to.

"That under said pretended corporation, the franchise of a corporation legally formed, organized and established under said acts, and extended under said section of the civil code, is now, and for a year last past has been, usurped, intruded into and unlawfully held and exercised by the defendants."

The defendants, in their answer, deny that the corporation named "is an illegal corporation. Deny that they have at any time usurped, intruded into, or illegally held any franchise or corporation. Deny that they have at any time seized or taken possession of any public highway. Deny that they have collected tolls on any public highway. Deny each and every allegation of the plaintiff's complaint as to the irregularity or illegality of the organization of the corporation called * * *. Deny each and every allegation of the plaintiff's complaint as to the illegal existence of" the corporation named "as a corporation since the year 1873, or that it illegally existed at any time since the year 1863."

They then allege that the company "is now a corporation, duly, regularly and legally organized under the laws of the state of California, and has for and during the twenty years last past and over, continually been such corporation in good faith, and acting as such corporation by owning, controlling, keeping in repair and collecting tolls on its wagon road * * * That said corporation was duly organized in the year 1863, under the laws of the state of California, and continued under said organization until the month of June, 1877, when the owners of said corporation, its franchise and property, under and by the laws of the state of California, as they, the said laws, were, in June, 1877, continued and extended the existence of the said corporation for the period of fifty years."

They then allege that "they and each of them are part owners and officers of the said corporation, and that all acts done by them in the premises are done in obeyance of and by direction of the officers of said corporation."

It is clear that the denials found in the answer raise no issues. The first four are denials of averments in the complaint which are mere conclusions of law from the facts stated: Pomeroy's Remedies and Remedial Rights, secs. 637, 638. The last two are general denials. The answer was verified, as required by the code: sec 446, C. C. P.; and in a verified answer general denials are inadmissible, and may properly be stricken out: People v. Hagar, 52 Cal., 182.

The affirmative averments state conclusions of law and not facts. It is alleged simply that the corporation was duly, regularly and legally formed, and that it has continued to act as such in good faith for more than twenty years, and that in 1877 the owners of its franchise and property, under the laws of the state, continued and ex-

tended its existence for fifty years. This is not enough. In a proceeding like this the burden is on the defendants to show that the corporation was legally formed and that its existence has been legally extended, and to that end they must set forth in their answer the facts showing such formation and extension: High's Extraordinary Legal Remedies, sec. 712.

The defendants pleaded, in bar of the action, a judgment rendered by the superior court of Trinity county, in a case wherein the corporation in question was plaintiff and the board of supervisors of that county was defendant.

But that was an application for a writ of mandate to compel the board of supervisors to fix the rates of tolls to be taken on the road claimed by plaintiff, and the right of the plaintiff to exercise the franchise which it claimed could not, in that proceeding, be inquired into: Weaverville W. R. Co. v. Board of Supervisors, 64 Cal., 69.

It is clear, therefore, that the judgment in that proceeding could not be a bar to this.

The defendants also alleged in their answer, that "Fordyce Bates, the informant and complainant herein, is estopped from giving this information or making this complaint," for the reason that he was one of the original organizers of the company; one of its first directors, and one of its first shareholders, as is shown by the complaint, and for the further reason that in 1879, 1880 and 1881, he was a member of the board of supervisors of the county of Trinity, and voted for, aided and assisted to fix the rates of toll for said corporation, on the said toll road, and by his acts induced the defendants to believe that the company was a just and legal corporation, and that in March, 1881, he represented that he "knew the said corporation was a good corporation," and thereby induced one of the defendants to buy its franchise and property for himself and his then associate.

The attorney general may commence an action like this upon his own information, or upon the complaint of a private party, and he must commence it, whenever he has reason to believe that a franchise has been usurped, intruded into, or unlawfully held or exercised by any person: Sec. 803, C. C. P. The action is commenced in the interest of the public to redress wrongs which injuriously affect the public. If the defendants have usurped, and are unlawfully exercising a franchise, why should an action commenced to redress the wrong be barred, because of any prior acts or misrepresentation of the informant? No case of a similar character has been called to our attention where the doctrine of estoppel has been invoked, and we fail to see how it can be invoked here.

The other points need not be mentioned.

On the whole, we think the judgment and order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 7,275.

HIBBERD ET AL. v. SMITH ET AL.

In Bank. Filed September 28, 1885.

PRIOR OPINION IN THE CASE, reported in 3 West Coast Rep., 446, adopted and approved.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiffs, and from an order denying the defendants a new trial. The facts are stated in the prior opinion, reported in 3 West Coast Rep., 446.

John W. Dwinelle, Theo. H. Hittell, and *M. G. Cobb,* for the appellants.

J. P. Hoge, and *A. A. Cohn,* for the respondents.

THE COURT. The opinion heretofore delivered in the above case, reported in 3 West Coast Rep., 446, is hereby approved and adopted by the court on rehearing, with the addition thereto of the following authorities: Welsh v. Sackett *et al.*, 12 Wisconsin, 243; Kingsbury v. Burnside, 58 Illinois, 310; Comm. v. Jackson, 10 Bush, Ky., 424; Budd v. Hays, 11 Ky., 34; Palmelee v. Simpson, 5 Wall., 81.

Judgment and order affirmed.

McKEE, J., expressed no opinion; SHARPSTEIN, J., disqualified.

No. 9,783.

GOAD v. MOULTON ET ALS.

Department One. Filed September 28, 1885.

DEED—CONSIDERATION NEED NOT BE EXPRESSED—LEGAL TITLE.—A deed is valid and operative although no consideration is expressed therein, and conveys the legal title to the grantee, whether it was made to hinder and delay creditors of the grantor, or not.

MARRIED WOMAN MAY MAKE PROMISSORY NOTE—BONA FIDE PURCHASER.—A promissory note, made by a married woman, in the hands of an innocent purchaser for value before its maturity, is valid and binding upon her, although it may have been agreed between her and the payee that payment of such note never would be demanded or required.

THE SAME—ACCOMMODATION NOTE—MARRIED WOMAN LIABLE ON.—A promissory note is an engagement respecting property which a married woman may make, although it can be enforced only as against her separate property. If she make such note for the accommodation of another, without receiving any consideration therefor, the note so made, in the hands of one who received it for value, is valid and binding upon her, though the holder knew how and why it was made.

THE ADMISSION OF IMMATERIAL evidence, calculated to mislead the jury, is error warranting a reversal.

APPEAL from a judgment of the superior court of the city and county of San Francisco, and from an order made on motion for a new trial. The opinion states the facts.

H. M Alberry, for the appellant.

Hart & White, for the respondents.

BELCHER, C. C. This is an action upon a promissory note, made by the defendant, Lina Moulton, to the defendant, D. L. Moulton, and by him endorsed to the plaintiff.

The case was tried before a jury, and the verdict and judgment were in favor of the defendants. The plaintiff moved for a new trial, and his motion was granted as to the defendant, D. L. Moulton, and denied as to the defendants, Lina and L. F. Moulton. The plaintiff appeals from the judgment and the order, in so far as it denied his motion for a new trial, and the defendant, D. L. Moulton, appeals from the order granting a new trial as to him.

By their answer the defendants alleged that the defendant, D. L. Moulton, being at the time financially embarrassed, was advised by the plaintiff, who was his attorney, for the purpose and with the intent to delay his creditors, to transfer and convey, without consideration, all his property to the defendant Lina, and that she should hold the same until a settlement was made with his creditors, or until their claims should be barred by the statute of limitations, and then reconvey it; that the plaintiff further advised and directed that in order that it might appear that a proper and sufficient consideration for the transfer of the property had been paid, and that the transfer had been made in good faith, and not to hinder and delay creditors, the note in suit should be made and endorsed and then left with him; that in pursuance of the plaintiff's advice the defendant, D. L. Moulton, conveyed his property to the defendant Lina, and then the note was made, endorsed and given to the plaintiff, but without any consideration therefor, and with the express understanding and agreement that it should never be presented for payment.

At the trial, it appeared that the defendant Lina was the daughter of defendant D. L., and the wife of the defendant L. F. Moulton, and that she and her husband resided on a farm, distant somewhere between twelve and twenty miles from the land conveyed to her by her father, and that in December, 1880, she had conveyed the land, so conveyed to her, to one Harris for the expressed consideration of sixteen thousand dollars.

D. L. Moulton was called as a witness for the defendants, and testified substantially to all the facts set up in the answer, and then, against the objection of the plaintiff, was permitted further to testify that he never delivered possession of any property under the deed to Lina, and that she never received any benefit from the sale of the land, and never got any property out of the whole transaction.

The foreman on the ranch of the defendant, L. F. Moulton, was then called as a witness, and, referring to the land conveyed to defendant Lina, was asked: "Now, state whether or not that land ever came under the dominion or control, or whether any occupation or exercise of control or use of that land was had by Mrs. Lina Moulton?" And again he was asked: "Was anything said to you, or did you ever have any directions from any one there—Mr. Moulton or Mrs. Moulton—respecting any action to be taken regarding this particular land?"

Harris, the purchaser of the land, was also called as a witness, and referring to the land conveyed to him by defendant Lina, was

asked: "Did you find her in possession of that property when you went there?"

These questions were all objected to by the plaintiff as irrelevant, incompetent and immaterial, and the objections were overruled and exceptions taken.

The plaintiff was called as a witness in his own behalf, and testified that he was not the attorney of the defendants, and that he did not advise the making of the conveyance to defendant Lina, or know of its being made, till some time after its execution; that D. L. Moulton was indebted to witness, and witness was urging payment; that Moulton told witness he had conveyed his land to Lina, and that she owed him two thousand five hundred dollars for the purchase money; that Moulton asked witness to accept her note in payment, and he agreed to do so; that the note was accepted by him in good faith in payment of an indebtedness of an equal amount, the evidences of which were at the time surrendered and cancelled; and that it was never agreed or understood that the note was not to be presented and paid at its maturity.

It is very evident, we think, that the court erred in admitting the testimony objected to.

The deed to defendant, Lina, was a good and operative deed, notwithstanding no consideration was expressed in it: Sections 1,092 and 1,614, civil code; 2 Hilliard on Real Property, 3d ed., 291; and it passed the legal title of the property to her, whether it was made to hinder and delay creditors or not.

She had power to make her promissory note for a part or all of the purchase money and to obligate herself for its payment, and a note so made, in the hands of an innocent purchaser for value before its maturity, is valid and binding upon her, whatever may have been the arrangement between herself and her father about its payment. The real issues before the jury were: Did the plaintiff receive the note in suit without consideration, and knowing it was not to be paid, as testified to by D. L. Moulton, or did he receive it in good faith and for its face value, and expecting it to be paid at its maturity, as testified to by him?

Upon these issues the testimony objected to was wholly irrelevant and immaterial, and tended to mislead the jury.

At the request of the defendants the court instructed the jury as follows: "If the jury believe from the evidence that the note sued on and introduced in evidence was executed by Mrs. Lina Moulton, for the accommodation of D. L. Moulton merely, and without consideration, and that at the time she was a married woman, and that the plaintiff knew such facts, then he cannot recover."

The instruction in effect told the jury that if Mrs. Moulton was a married woman, and, without consideration, executed the note for the accommodation of D. L. Moulton, and the plaintiff knew these facts, then their verdict must be for the defendants. This was error.

In this state a married woman may enter into any engagement or transaction respecting property which she might if unmarried: Sec. 158, C. C.

A promissory note is an engagement respecting property which a married woman may make, though it can be enforced only as against her separate property: Marlow v. Barlew, 53 Cal., 456; Alexander v. Bouton, 55 Cal., 15.

If Mrs. Moulton had been unmarried, she could have made a promissory note for the accommodation of her father, without receiving any consideration for so doing, and the note, so made, in the hands of one who received it for value, would, beyond question, have been valid and binding upon her, though the holder knew how and why it was made.

But the fact that she was married does not at all change the rule or limit her power in this respect.

It does not appear why the court below granted the motion for new trial as to the endorser of the note and denied it as to the maker. There was no reason for granting it as to one and not the other, except that defendant Lina was a married woman, and, therefore, as claimed by counsel, not bound by her note. Being bound by it, as we have seen, if the testimony was insufficient to justify the verdict as to one, it was equally so as to both, and the new trial should have been granted as to both.

In our opinion, the judgment and order as to defendant Lina Moulton should be reversed and the cause remanded for a new trial, and the order as to defendant D. L. Moulton should be affirmed.

FOOTE, C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order as to defendant Lina Moulton are reversed and cause remanded for a new trial, and the order as to defendant D. L. Moulton is affirmed.

No. 8,773.

SWIFT ET AL., EXECUTORS, ETC. *v.* SAN FRANCISCO STOCK AND EXCHANGE BOARD.

Department One. Filed September 29, 1885.

SAN FRANCISCO STOCK EXCHANGE BOARD—TRUST FUND—DISPOSITION OF BY MEMBER—WILL CONSTRUED.—The defendant is a voluntary unincorporated association, composed of one hundred members, who, under that name, have combined for the purpose of facilitating the purchase and sale of stock by its members. The constitution adopted by them contained the following provisions: "There shall, at all times, exist in the board a committee of at least three members, or more, to be known as the trust fund committee. * * * It shall be the duty of such committee to take charge of all moneys which may come into their hands * * * to constitute a trust fund, to be used and applied by such committee in the following manner. Upon the death of a member of the board said trust fund committee shall pay from the increase in their hands, from investment of said moneys, to such person or persons, object or objects, as may have been designated in writing by such deceased member, the sum of ten thousand dollars." The constitution, after providing for a certain disposition of the said ten thousand dollars, among the widow and children of the deceased member, in case he made no disposition thereof, further provided, that "the payment herein provided for shall be deemed absolute donations to the persons, or for the object to which the same are

made or applied, free from all claim or control from any other source or persons." The testator was a member of the board, and died without leaving a widow or children. His will, after leaving pecuniary legacies aggregating sixty thousand dollars, provided: "Should my estate be worth more than sixty thousand dollars, and I now estimate it at eighty thousand dollars, including my seat in the San Francisco Stock Exchange Board, and the insurance on my life by said board, I give and devise to D. L. McDonald the sum of five thousand dollars. The balance of my estate I desire paid over to my mother." *Held*, that the defendant was not an association of persons, transacting business under a common name, and that section 388 of the code of civil procedure permitting an action against such association by its common name, did not apply to the present action; that it was not engaged in the business of life insurance; that the donation provided for in the constitution of the board, did not belong to the estate of the deceased member, and that his executors were not entitled to receive it as part of such estate; and that the will did not designate such executors as beneficiaries of the trust fund.

APPEAL from a judgment of the superior court, entered in favor of the defendants, and from an order denying the plaintiffs a new trial. The opinion states the facts.

Estee & Boalt, for the appellants.

Garber, Thornton & Bishop, for the respondent.

MCKEE, J. The San Francisco Stock and Exchange Board is a voluntary, unincorporated association, composed of one hundred persons, who, under that name, have combined for the purpose of facilitating the purchase and sale of stocks by its members. For that purpose, the originators of the association organized in the year 1862, by subscribing to a body of rules, regulations and provisions contained in articles of agreement, in writing, which they adopted as the constitution and by-laws of the association.

Article xxii. of the constitution adopted by them contains the following provisions:

TRUST FUND COMMITTEE.

"There shall, at all times, exist in this board a committee composed of at least three members, or more, at the discretion of the board, to be known as the trust fund committee. * * * It shall be the duty of such committee to take charge of all moneys which may come into their hands, by direction and vote of the board, and invest the same according to their best discretion and judgment; said moneys, and the increase of the same under such investments, to constitute a trust fund, to be used and applied by such committee in the following manner, viz.:

"Upon the death of a member of the board, said trust fund committee shall pay from the increase in their hands, from investment of said moneys, to such person or persons, object or objects, as may have been designated in writing by such deceased member, the sum of ten thousand dollars in United States gold coin. In case there be no such written disposition made, then to the widow of such deceased member the sum of ten thousand dollars in United States gold coin. In case there shall be no widow, and a child or children surviving such member, then to such child or children, equally, share and share alike. If there shall be neither widow, child nor children surviving such deceased member entitled to receive said money, nor any disposition made of the same, as hereinbefore pro-

vided, then there shall be no payment or provision made under this article. The payments herein provided for shall be deemed absolute donations to the persons, or for the object to which the same are made or applied, free from all claim or control from any other source or persons.

"In case the increase of said moneys shall not have accumulated to a sum sufficient to meet the donations herein provided for, as the same shall be needed, the deficit shall be made good at once by assessments *pro rata* upon the members of the board, and collected in like manner and under the same penalties as other dues."

Of the board, Frank Swift was a member, from the twenty-first of August, 1875, until the sixth of January, 1877. As such, he had fully complied with all the requirements of the constitution and by-laws, so that, in the event of his death, his surviving wife and children, or any person or object that he might designate, according to the provisions of article xxii., would be entitled to receive the donation provided by said article. And, while a member of the board, he died in the city and county of San Francisco, on the sixth of January, 1877, leaving no wife, or child, or children surviving him; but he left a will, which was probated, and the plaintiffs, as the executors nominated by the will, were appointed and qualified as executors thereof.

The will contained the following bequests:

"1st. I give and bequeath to my father, Chas. H. Swift, the sum of twelve thousand five hundred dollars; to my mother, Adelia B. Swift, the sum of twelve thousand five hundred dollars; to my sister, Ellen A. Brown, five thousand dollars; to my sister, Maggie M. Mills, five thousand dollars; to my sister, Fannie E. Loham, five thousand dollars; to my niece, Florence A. Durden, ten thousand dollars; to my niece, Millie B. Durden, five thousand dollars; to my niece, Minnie F. Durden, now married to Z. T. Therrel, five thousand dollars. These amounts, aggregating sixty thousand dollars, I desire paid to said respective legatees, within one year after my decease.

"2d. Should my estate be worth more than sixty thousand dollars ($60,000) and I now estimate it at eighty thousand dollars, including my seat in the San Francisco Stock Exchange Board, and the insurance on my life by said board, I give and devise to D. L. McDonald, of San Francisco, the brother of my late dearly beloved wife, the sum of five thousand dollars. * * * * * * * * *

"5th. The balance of my estate I desire paid over to my mother, Mrs. C. H. Swift, and by her distributed among the poor in any manner she may see proper."

After the executors had qualified and entered upon the discharge of their duties they made a demand upon the Stock and Exchange Board for payment to them of the "donation," to which they claimed that they, as executors, were entitled. At the time they made this demand, there was sufficient money in the trust fund for payment; but the defendant refused to pay upon the ground that no disposition

of the "donation" had been made as required by its constitution and by-laws. And, seasonably, after the demand and refusal, the executors commenced the action in hand to recover against the defendant a money judgment for said sum of ten thousand dollars.

The action is founded upon the existence of a contractual relation between the San Francisco Stock and Exchange Board, and its members, for the payment of ten thousand dollars, in case of the death of a member, for which, it is claimed, his executor or administrator may maintain an action upon sec. 388, code of civil procedure. Sec. 388 reads thus:

"When two or more persons, associated in any business, transact such business under a common name, whether it comprise the names of such persons or not, the association may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants, and had been sued upon their joint liability."

The personal representative of a decedent may maintain any action founded upon contract which could be maintained by the decedent if he were alive: Sec. 1,582, C. C. P. But Frank Smith, if alive, could not maintain an action against the association of which he was a member for the recovery of the sum of ten thousand dollars sought to be recovered in this action, unless the members of the association were associated in a business transacted by them in the name of the association in which they contracted to pay.

The complaint affirms, and the answer denies, that the members were associated in business "and transacted and carried on the business of buying and selling mining and other stocks at the city and county of San Francisco under the common name of the San Francisco Stock and Exchange Board." Upon the issue thus joined the court finds:

"That the defendant is not, and was not at any of the times mentioned in the complaint, an organization of persons or composed of persons who are, or at any of the times mentioned in the complaint, have been associated in business, or who transact or carry on the business of buying or selling mining or other stocks, or any other business, at the city and county of San Francisco, or elsewhere, under the common name of 'The San Francisco Stock and Exchange Board,' or under any other name, or at all."

This finding is attacked as unsustained by the evidence; but it is unquestionable that the main objects of the association are, the establishment of a mart for the sale and purchase of stocks and exchange by the members for their *individual* gain or loss, and the creation of a trust fund for the benefit of surviving wife or children, etc., of deceased members; and the evidence shows that, in pursuit of those objects, the association rents and furnishes a hall in which the members meet, at stated hours of the day, and engage in individual transactions with each other, under and in accordance with the rules

and regulations adopted by them for that purpose; and that the rent of the hall, together with the incidental expenses connected therewith, are paid out of fees collected by the association for the listing of stocks and dues and fines collected from its members; but these things are done merely for the convenience of the members, and as incidental to the primary objects of the association: Lafond v. Deems, 8 Abb., N. C., 344.

The collection of these fees, fines or dues, does not constitute a business in which the members participate in the way of profit or loss as partners or otherwise; and when collected they do not constitute property in which the members have a right to any proportional part of it. "The association is, therefore, not a partnership; it does not share in the losses of the individual associates; each member takes his own gains and incidentally sustains the losses incident to his engagement. * * * There are no profits earned to be divided among its members, nor are there any losses to be borne arising out of the acts of the joint body. * * * The association looks to a continued existence unaffected by the death, resignation, suspension or removal of its members. If it was a copartnership, the retirement of death of one of its members would *ipso facto* dissolve it:" White v. Brownell, 3 Abb., 323.

"Nor do the members, as stockholders, hold any interest in the property derived from the collection of fees, dues or fines. Such property is a mere incident and not the main purpose or object of the association. A member has no severable proprietary interest in it, or a right to any proportional part of it upon his withdrawal, removal or death:" Dos Pasos on Stock Exchanges, p. 15.

And the bond of association contained in the articles of agreement contains nothing which binds the members in the associate name, to pay a sum of money to any member, or to do any act, or thing, from which a promise to pay a sum of money to any member or members *in personam* would be implied. In other words, there is no promise, express or implied, by the members, collectively or individually, in the name of the association, out of which springs a personal obligation in favor of any member, for a breach of which an action would be maintainable against the association by a member in his life time, or by his personal representative after his death.

But it is urged that the association transacted the business of life insurance of its members, because section 23 of the constitution, as amended in 1875, required a candidate for the benefit of the trust fund, to file with the secretary of the board a medical certificate attesting his fitness, to be accepted by the board as a participant in the "life insurance fund;" and it is argued from this article, that the members of the association are associated in the business of life insurance and transact such business in the common name of the association.

Reading together sections 22 and 23 of the constitution, we find nothing which justifies the conclusion that the association, in connection with the fund in controversy, is engaged in transacting an

insurance business. There is no contract of insurance between the members. The constitution merely provides for a beneficiary fund, and for the payment, out of the fund, of a specified sum to the surviving or designated person or persons qualified to receive it upon the death of a member. The term "life insurance" does not apply to such an object: Barboro v. Occidental Grove, 4 Mo. App., 429. So, in Durian v. Central Verein, 7 Daly, N. Y., 168, it was held that where a beneficial society, by its constitution, provides for the payment of a specified sum to the wife upon the husband's death, such right is not in the nature of an insurance upon the husband's life, and the society may, by a subsequent change in its constitution or by-laws, make the money payable to some nominee of the husband other than the wife.

And, in distinguishing between an association, whose primary object was contracting with its members for the insurance of their lives, and an association organized for a social, literary or benevolent purpose, to which a feature of mutual insurance is added for the purpose of mutual aid, the supreme court of Missouri hold that the latter cannot be said "to be carrying on the business of insurance, and with which we suppose it was not the intention of the legislature to interfere:" State *ex rel.*, etc., v. Benefit Association, 6 Mo., 172. See, also, Lafond v. Deems, *supra*.

I, therefore, think that the acts performed by the association in carrying out the purposes for which it was established are not done in the transaction of a business carried on in the name of the association for the profit or loss of its members. It rents rooms, employs officers, fixes fees and dues, imposes fines, and collects them; and when the retirement or death of a member renders it necessary to elect a successor, by the sale of his place in the board; or to levy an assessment for the purpose of making payment out of the trust fund of the donation provided by the constitution to the surviving members of the family or designated appointee of the deceased member, it sells the one and enforces the collection of the other from the members "in like manner and under the same penalties as other dues." But all these things, although in the nature of business, do not in themselves constitute a business for the transaction of which the members have associated themselves in the name of the association. They are merely incidental to the primary objects of the association.

Yet, while the contractual obligations *in personam* bound the members of the association as partners or otherwise, for transacting a business in the common name of the association for their profit or loss, there spring from the articles of agreement obligations incidental to the creation of rights for the benefit of others and of duties imposed upon the association in connection with the fund provided for such rights, in the event of the death of any one of the members. These are rights which arise out of the executory contract between the association and the members in favor of surviving members of the family of a deceased member or the persons

or objects designated by him, before his decease, according to the provisions of the constitution, as beneficiaries of the trust. If such surviving or designated beneficiaries exist upon the death of a member the rights to the beneficiary fund vest in them and the corresponding duty is imposed upon the association to pay to them out of the fund the sum agreed to be paid. But the articles of agreement provide that such payments "shall be deemed absolute *donations to the persons*, or for the objects to which the same are made or applied, *free from all claim or control from any other source or persons.*"

The beneficiaries are, therefore, the only persons qualified to receive a "donation" out of the fund; it does not belong to the estate of the deceased member and is not chargeable with the payment of his debts.

So, in an action brought to determine the right to a beneficiary fund, payable by an association upon the death of one of its members, under a constitution which provided, "that on the death of a member in good standing a beneficiary fund shall be paid 'to the person or persons named by the decedent and entered by his order on the will book,'" the supreme court of Michigan held, that the fund payable on the death of a member of the association to persons named by him is not to be treated as part of his estate subject to his debts, and does not go to the administrator, but should be paid directly to the beneficiaries: The C. M. Benefit Association v. Priest *et al.*, 46 Mich., 429. To the same effect will be found Ballou v. Gile, administrator, etc., 50 Wis., 614; Vollman's Appeal, 92 Penn. St., 50; Masonic Mutual Life Ins. Co. v. Miller, administrator, 13 Bush., 489; Arthur v. Odd Fellows, 29 Ohio St., 557.

As, therefore, the beneficiary fund of the association was no part of the estate of one of its deceased members, but belonged to the surviving or designated donees of the fund, it follows the testator had no interest in it upon which a will could operate; and the executors are not entitled to recover it as part of the estate of their testator.

Yet, while the testator had no personally enforceable right or interest in the fund itself, he had, under the constitution of the association, a power of appointment—authority to designate the ultimate beneficiary. But that was a power exercisable by him, and if not exercised prior to his death the power and authority died with him. Nobody representing him could exercise it after his death. If, upon his death, there were no survivors and no persons or objects designated to take, he had nothing in the fund which would descend, or upon which his will could operate. "His contract," says the supreme court of New York, "effected that result. * * * The condition of payment to which he agreed was that the money should be paid out of the fund to the person designated by him before his decease:" Hellenberg v. I. O. of B. B., 94 N. Y., 585-6.

It may be conceded that a member of the association, in the exercise of this power of appointment, could designate his administrator or the executors of his will, or any person or objects as the

recipients of his bounty; and the question arises whether the testator, by his will, designated the executors as beneficiaries of the trust fund. The court finds:

"Said Frank Swift did not, in or by his last will and testament, or otherwise, or at all, designate any person or persons, or object or objects to whom or to which the sum of ten thousand ($10,000) dollars, or any part thereof, mentioned in and provided for by article xii. of the constitution of said association, should be paid. That * * * he did not, in or by said last will and testament, or otherwise, designate said sum of ten thousand ($10,000) dollars, or any part thereof, as included in or belonging to the estate of which by said will he was making testamentary disposition."

This finding is also attacked as unsustained by the evidence.

The question of designation must be determined by the will itself, for it is the only evidence in the case of an exercise of the power of appointment. In the will the testator makes no mention of the trust fund, except, incidentally, in connection with an estimate of the value of his estate. After making specific bequests to the amount of sixty thousand dollars, he adds: "Should my estate be worth more than sixty thousand dollars (and I now estimate it at eighty thousand dollars, including my seat in the San Francisco Stock and Exchange Board and the insurance on my life by said board), I give, bequeath, etc. * * * And the balance of my estate I desire paid over to my mother, * * * and by her distributed among the poor in any manner she may see proper."

It might well be inferred from this language that the testator intended to mix what he supposed to be his interest in the trust fund of the board with his estate, for the purpose of exercising over it, as part of his estate, his disposing power. But, as we have seen, he had no disposing power over it as part of his estate. The only power exercisable over it was that defined by the constitution of the board, and that was merely a power of appointment of some person or body to receive it as a thing distinct and separate from his estate. Undoubtedly, the testator might have exercised this power of appointment of a person to receive the fund and apply it to the purposes of his estate in his will, and he could have designated in that way his executors or any other persons; but the will does not name the executors, or creditors, or legatees, jointly or individually, as persons to receive payment of the "donation" for the purposes of his estate or otherwise. And, for aught that appears in the case itself, the estate of the testator is sufficient to meet all the special bequests of the will. That being so, the beneficiary fund did not pass, either by the special bequests or the residuary clause of the will, as part of the estate of the testator, and the will itself did not operate as a valid execution of the power of appointment.

In the case of the Maryland Mutual Benevolent Society of the Imperial Order of Red Men of the state of Maryland v. Clendinen, administrator, with the will annexed, of Ferdinand Stansbury, 44 Md., 459, the testator, at the time of his death, was a member in

good standing of an incorporated benevolent society, which, by its constitution provided, upon the death of any member, for the payment of a fixed sum "to the widow, child, children, or such person or persons to whom the deceased may have disposed of the same by will or assignment." The testator left neither widow nor children, but, by his will, he bequeathed as follows: "After the payment of all my just debts and funeral expenses out of my estate, I devise as follows: I give and bequeath the entire residue of my estate to my three sisters," etc. The administrator claimed that the money passed by the will, and that he was entitled to recover it as assets of the estate, but the court held that the fund assigned by the charter to the widow and children of the deceased, or his legatee or assignee, was not assets recoverable by the administrator; that the *jus disponendi* given by the charter was a mere power; and that the will was not a valid exercise of the power, the intention to exercise it not being expressed, and it not appearing that there was no other estate upon which it might operate.

In default of appointment, the trustees of the fund would not be justified to pay. By the articles of agreement they were bound to pay to the surviving members of the family entitled to payment, or to the person or object designated for that purpose. The contract was to pay to no one else; and, if there were no survivors to take, and no persons or objects designated, the trustees were not bound to pay at all.

Judgment and order affirmed.

ROSS, J., and MCKINSTRY, J., CONCURRING. We concur in the judgment, on the ground that the executors of the deceased Swift cannot sustain the action. Whether or not, any other person or persons can do so, it is not necessary, we think, to decide. That the donation in question formed no part of the estate of the deceased, cannot be doubted, and that the rights of the plaintiffs as executors are limited to the estate of their testate, seems, to us, equally clear.

No. 9,765.

LOWER KING'S R. W. D. CO. *v.* KING'S R. & F. C. CO.

Department Two Filed September 29, 1885.

AMENDMENT TO PLEADINGS—DISCRETION—ABUSE OF.—The allowance of amendments to pleadings is, in general, largely in the discretion of the trial court, but, under the circumstances of this case, and especially from the fact that the attorney for the plaintiff received a copy of the amended answer as filed, without objection or protest, until after the trial had commenced, *held*, that the discretion of the trial court, in refusing to allow the defendant to amend its answer, had been abused.

APPEAL from a judgment of the superior court of Tulare county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

H. S. Dixon and *D. S. Terry*, for the appellant.

Brown & Daggett and *A. Jacobs, jr.*, for the respondent.

MYRICK, J. This is an action to recover damages for an alleged improper diversion of water from King's river, and for an injunction restraining further diversion. The complaint was filed April 23, 1880, and on the sixth of September an answer was filed. In October of the same year an appeal was taken from an order refusing to change the place of trial, and the appeal was in this court until May 22, 1882, when the remittitur went down.

On the fourth of September, 1882, without previous notice to the defendants, plaintiff obtained an order of the court setting the case down for trial on the sixth of October. Negotiations for a compromise and settlement had been pending between the parties, and were undetermined when the last order was made. On the twenty-third of September, the defendant, without obtaining leave of the court, and without notice, filed an amended answer, setting up, among other defenses not contained in the original answer, prior appropriation by defendant and those under whom it claimed. A copy of the amended answer was delivered to and received by plaintiff's attorneys, without objection and without protest.

No notice was given that the defendant would apply for leave to file the amended answer. On the sixth of October, the case was called for trial. The plaintiff asked a postponement until the following day because certain depositions had not been returned. Defendant objected to the postponement, unless the testimony of a witness, who did not wish to be detained, could be taken. The parties consented to the examination of the witness, which was had, and further hearing postponed. On the following day, October 7, the case was called for trial and answered "ready" by both parties. Before further proceeding the plaintiff moved to strike from the files the answer of September twenty-third, because it had been filed without leave, and because no notice had been given. The court granted the motion againt defendant's protest and exception. The defendant then asked leave to file the amended answer, presenting affidavits to show why the new defenses set up had not been presented in the original answer.

The plaintiff objected on the ground that no notice of the application had been given. The motion was denied. Defendant then asked a postponement, that he might prepare and file additional affidavits, which was also denied. The court then took a noon recess, and after recess the defendant read an additional affidavit and renewed his motion for leave to refile the amended answer. This motion was denied. The trial then proceeded. The plaintiff gave evidence tending to show that its appropriation commenced in the latter part of 1870. The defendant offered to show that its predecessor's acts of appropriation commenced in July, 1870, and thus, that defendant's rights ante-dated plaintiff's claim of right. This evidence was excluded. The defendant made a further effort, during the trial, to amend its answer so as to admit evidence of prior appropriation.

We are not prepared to say the court erred in excluding the evidence offered, for the reason that it was not within the issue; but we think the defendant should have been permitted to make its defense.

As between the parties to this controversy, one party or the other has the better right. The allowance of amendments to pleadings is in general largely in the discretion of the trial court, but we think the record of the testimony given and offered and rejected, shows that such discretion was not properly exercised in this case. In strictness, under the pleadings, it may be that plaintiff has the better right; but if the defendant can show the matters set forth in its proposed amended answer, it may be that the defendant has the better right. We do not hold that the defendant had the right, without notice and without leave, to file its answer of September 23, but we think the circumstance that plaintiff's attorneys received a copy without objection and without protest, negotiations for a settlement and compromise having been pending, might well have led defendant's attorneys to suppose the amended answer would be suffered to remain without objection. Not until after the trial had actually commenced, one witness having been examined, was this supposition dispelled; and at that time they found themselves engaged in a trial in which they could not stand, evenhanded, with their opponents. The object of judicial proceedings is to discover all the facts of a case, and apply the law; and the theory of the code is that the parties should each have reasonable opportunity to present his side of the case. We think the defendant has not had such opportunity in this case.

Judgment and order reversed and cause remanded, with directions to permit the defendant to file its amended answer.

MORRISON, C. J., and THORNTON, J., concurred.

No. 9,188.

EVANS *v.* ROSS ET AL.

In Bank. Filed September 30, 1885.

DIVERSION OF WATER—ACTION TO RESTRAIN IS IN EQUITY—NUISANCE.—An action to recover damages for the obstruction, diversion and use of the waters of a stream, and for an injunction restraining the same is a case in equity for abating a nuisance.

THE SAME—JURY TRIAL—VERDICT IS ADVISORY ONLY—GENERAL VERDICT.—In such action a party is not entitled to a jury, but it is in the discretion of the court to call one. When a jury is called, the court directs proper issues to be framed and submitted to it. The verdict on such issues is only advisory to the court, and it may adopt the findings of the jury or reject them and itself find the facts. A general verdict is insufficient and should be disregarded. Consequently a refusal to direct the jury to find a general verdict is not error.

THE SAME—ADVERSE POSSESSION.—An action to enforce the right to water can be barred by five years adverse possession. The findings reviewed and held to show such adverse possession.

THE SAME—SEVERAL DIVERSION—JOINT ACTION FOR DAMAGES.—A joint action to recover damages for the diversion of water cannot be maintained against two defendants, each of whom made the diversion for his own benefit, separately from and without any collusion, arrangement or understanding with his co-defendant, and without any consent or joint action between them.

APPEAL from a judgment of the superior court of Lassen county, entered in favor of the defendants. The opinion states the facts.

E. V. Spencer, for the appellant.

J. D. Goodwin, for the respondents.

THORNTON, J. This is an action to recover damages for the obstruction, diversion and use of the water of a stream, and for an injunction restraining defendants from continuing such obstruction, diversion and use. The court below, on the trial, submitted a number of special issues to a jury, which were answered by it.

Before the jury retired, counsel for plaintiff demanded of the court that the jury be allowed to bring in a general verdict in addition to the verdict on the special issues submitted. This the court refused, and plaintiff excepted. The court did not err in refusing the demand of plaintiff. The cause is one in equity. This was so held in court: Wright v. Bear River Mining Company, 30 Cal., 576; Yolo County v. Sacramento, 36 Id., 193, and Learned v. Castle, 6 West Coast Rep., 480. In Yolo County v. Sacramento, the court used this language: "But we do not consider that the abatement of a nuisance and the recovery of damages therefor are distinct causes of action in the sense of the rule invoked by the demurrer. The nuisance is the cause of action. The abatement and damages therefor are merely different kinds of relief to which the plaintiff may be entitled."

In the case under consideration, the prayer is for an injunction enjoining and prohibiting the defendants, etc., from in any way obstructing or diverting the waters of said creek, etc.

The prayer is not in so many words for removing and abating a nuisance, but equivalent words are used. Under such a prayer, a mandatory injunction could be granted for abating the obstruction of the water by a removal of it with this form of prayer; we hold it to be an action for abating a nuisance, and that the diversion of a water course is a nuisance was held in Tuolumne W. Co. v. Chapman, 8 Cal., 392. See, also, Park v. Kilham, 8 Cal., 77.

It is well settled that a party is not entitled to a jury in an equity case. It is in the discretion of the court in such a case to call a jury. When a jury is called, the court directs proper issues to be framed and submitted to it. The verdict on these issues is only advisory to the court, and it may adopt the findings of the jury or reject them, and itself find the facts: Warring v. Freer, 64 Cal., 56. A general verdict is insufficient, and should be disregarded: Brandt v. Wheaton, 52 Cal., 430.

By reason of what is said above, the court did not err in its ruling as to a general verdict.

It also follows from what is said above that the court did not err in setting aside the verdict of the jury and finding the facts itself. Neither did it err in denying plaintiff's motion for judgment on the verdict. The findings sustain the judgment in favor of defendant Ross.

The twenty-third finding is as follows:

"That since the year 1862 until the commencement of this action, defendant Ross has continuously and uninterruptedly, during the irrigating season of each year, so long as there was sufficient water in the creek, diverted and used the said water of said creek to the extent of one hundred and forty-nine inches, measured under a four inch pressure, through the dams and ditches heretofore described on the west side of said creek.

"That he has used the same for irrigating his said lands as before described, claiming all the time the right to do so as against the whole world.

"That such diversions, use and claim of right have been with the full knowledge of plaintiff and his grantors.

"I find, also, that Ross' use of the water has been adverse and hostile to plaintiff, and an injury to plaintiff.

"I find, further, that plaintiff and his grantors have never allowed five years to elapse without protesting and objecting to the same."

That an action to enforce the right to water can be barred by five years' adverse possession, we considered settled in this state by the cases of the Union Water Company v. Crary, 25 Cal., 509, and Davis v. Gale, 32 Id., 35. In the case first cited from 25 Cal., the court used this language: "The right of the first appropriator may be lost, in whole or in some limited portions, by the adverse possession of another. And when such person has had the continued, uninterrupted and adverse enjoyment of the water course, or of some certain portion of it, during the period limited by the statute of limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him."

The finding above quoted shows a use and diversion of the water of the stream in controversy by defendant Ross, for irrigating his lands during the irrigating season for more than five years before the commencement of the action, continuously and uninterruptedly during such season in said years, to the extent of one hundred and forty-nine inches under a four inch pressure through the dams and ditches mentioned in the findings; that this use was made under a claim of right adverse and hostile to the plaintiff; that this use and diversion were made with the knowledge of the plaintiff, and was injurious to him.

We think that this finding determines the defense of the statute of limitations in favor of defendant Ross, to the extent of the one hundred and forty-nine inches under a four inch pressure above mentioned.

We find no error in the judgment against Ross.

The same is true as to defendant Williams. The plaintiff was entitled to the injunction against Williams awarded by the judgment. But it is contended that inasmuch as the court found that plaintiff was damaged by the acts of Williams, to the extent of seven hundred and fifty dollars, that he is entitled to judgment against Williams for that amount.

In answer to this, we have to say that it was pleaded by Williams that he was improperly joined as a defendant with Ross, in this—that the use and diversion of the water made by him, was made for his own benefit, separately from and without any collusion, arrangement or understanding between him and his codefendant, and without any consent of or joint action between them.

The court found that all the acts done by defendants, referring to the acts of use and diversion of water, were done while acting severally, and not in concert or collusion.

The damage caused by each defendant was several, and no action could be maintained against them jointly for it.

We find no error in the record and the judgment is affirmed.

MORRISON, C. J., concurred.

MYRICK, J. I concur in the foregoing opinion, and in the judgment, in all respects, except where it is held that the diversion of water is a nuisance; on that point I express no opinion. That the case is one in equity, I have no doubt.

ROSS, J. I concur in the judgment.

No. 11,122.

CARIT v. CHARLES ET AL.

Department Two. Filed October 3, 1885.

APPEAL FROM ORDER MADE AFTER JUDGMENT—STAY OF EXECUTION ON JUDGMENT.—On an appeal from an order made after final judgment, when no appeal is taken from the judgment the supreme court has no power, under section 949 of the code of civil procedure, to order a stay of execution on the judgment not appealed from.

NOTICE for a stay of execution. The opinion states the facts.

Cook & Cook, for the petitioner.

D. H. Whittemore, for the respondent.

THORNTON, J. This is a motion by Charles above named for a stay of execution upon a judgment recovered against him and another.

After the recovery of the judgment, Charles made an application for a discharge from his debts under the insolvent laws of the state, which was granted. In the schedule filed in the proceedings in insolvency, the judgment above mentioned was placed. After the procurement of the discharge of Charles, an execution was issued on the judgment, which came into the hands of the sheriff. The petitioner Charles, after the issuance of the execution mentioned above, filed among the papers in the action above entitled a certified copy of his discharge in insolvency, and subsequently, on the thirty-first of May, 1884, gave notice of a motion for the sixth day of June, 1884, to set aside the execution before mentioned, to stay perpetually the issuance of any execution on said judgment against petitioner Charles, and ordering that the judgment as against the peti-

tioner be marked satisfied and discharged. This motion was based on the discharge in insolvency of the petitioner. This motion was afterwards heard and denied. From this order an appeal was subsequently prosecuted to this court. It appears that the undertaking on appeal for three hundred dollars has been waived according to law.

On the foregoing facts, the motion by Charles in this court for a stay of execution on the judgment aforesaid is based.

We see no reason why this motion should be granted. The waiver of the undertaking is sufficient to stay any execution of the order appealed from, were any stay necessary. But it is manifestly insufficient to stay execution on the judgment referred to, even if any such stay could be granted on an appeal from an order made after the judgment. This court has no authority under the statute for ordering any such stay. The stay of execution on a judgment for the payment of money is only allowed on an appeal from the judgment, and giving the undertaking in double the amount, etc., as required by the statute: C. C. P., sec. 942.

Section 949, code of civil procedure, only refers to a stay of execution upon the order or judgment appealed from, in cases not provided for in sections 942, 943, 944 and 945. In this case, there is no appeal from a judgment; the appeal is from an order made after final judgment denying Charles' motion for an order, on which no stay is requisite. We think it clear that this court has no power, under the statute, to grant the stay asked for.

The court sees no reason why, if the order prayed for here were within its discretionary powers, that it should be granted. It certainly would not be granted without requiring the amplest security for the satisfaction of the judgment.

The application must be dismissed, and it is so ordered.

MYRICK, J., and MCKINSTRY, J., concurred.

WEST COAST REPORTER.

WHOLE NO. 94. OCTOBER 15, 1885. VOL. VII. NO. 14.

SUPREME COURT OF ARIZONA.

SMITH & CO. *v.* COUNTY OF MOHAVE.

Filed September 14, 1885.

COUNTIES—LIABILITY TO BE SUED—PRESENTATION AND REJECTION OF CLAIMS.—The liability of a county to be sued on an account, after its presentation to and rejection by the board of supervisors, has not been affected by the act of February 12, 1881.

APPEAL from the district court of Mohave county. The opinion states the facts.

E. M. Sanford, for the appellants.

Clark Churchill, attorney general, for the respondent.

FITZGERALD, J. This was an action brought by plaintiffs against the county of Mohave on a contract by which the plaintiffs agreed to do the county printing at a fixed compensation to be paid for by the defendant. The complaint, after setting forth the contract as executed, alleges full performance of its terms and conditions by plaintiffs, and presentation to and rejection of their demand by the board of supervisors of said county.

Defendant demurred to the complaint, which was sustained by the court below, and the propriety of its action in that respect is brought in question by this appeal. The sole question presented at the hearing of the demurrer in the court below, and the only one urged here, is, whether the district court of Mohave county has jurisdiction to determine the merits of a claim against a county by original proceedings in the nature of assumpsit commenced in that court when such claim has been presented to, and rejected, in whole or in part, by the board of supervisors.

It is contended, in support of the demurrer, that the act of February 12, 1881, expressly withdraws questions of this character from the courts, and confers exclusive jurisdiction upon the board of supervisors.

The language of the act shows, we think, conclusively, that the legislature intended simply to prescribe the manner of presenting claims against counties, and to define the duties of the board of supervisors in passing on the same, and that it in no way modifies or affects section 3 of chapter 2 of the compiled laws, authorizing counties to sue and be sued. The right to sue a county remains un-

impaired, and extends to every case of account *after presentation and rejection by the board of supervisors.*

Judgment and order reversed and cause remanded, with directions to the court below to overrule the demurrer.

HOWARD, C. J., and PINNEY, J., concurred

SUPREME COURT OF NEVADA.

MARTIN *v.* VICTOR M. & M. CO.

Filed October 3, 1885.

EVIDENCE—FINDINGS.—In an action to recover for work and labor and money expended for the use of defendant, the evidence reviewed at length, and held that the findings of the lower court were correct.

APPEAL from a judgment of the third judicial district court, Esmeralda county, entered in favor of plaintiff.

P. Reddy, for the appellant.

Thos. H. Wells, for the respondent.

HAWLEY, J. The amended complaint in this action, contains two counts. The first is for two thousand two hundred and twenty-four dollars, upon a stated account as settled May 4, 1878. The second is for an alleged indebtedness of twenty thousand two hundred and seventy-three dollars and twenty-eight cents, itemized as follows: Two thousand dollars money had and received by defendant from plaintiff, on October 25, 1879; ten thousand and seventy-two dollars for money paid out and expended by plaintiff for the use and benefit of defendant; three hundred and twenty-one dollars for tools, materials in building house, office expenses, powder and taxes; three hundred and forty-three dollars and sixty cents, judgments in justice's court against defendants, paid by plaintiff; seven thousand five hundred and thirty-five dollars for one thousand five hundred and seven days work and labor, as foreman of the defendant, at five dollars per day. There is an admitted credit of ten thousand three hundred and twenty dollars and forty-six cents, and the suit is brought to recover an alleged balance of twelve thousand one hundred and seventy-six dollars and eighty-two cents.

The answer specifically denies each and every allegation in the complaint, and generally denies any indebtedness whatever. The cause was tried before the court without a jury, and plaintiff recovered a judgment for five thousand seven hundred and sixty-two dollars and nine cents. Defendant appeals and contends that the evidence is insufficient to support the findings and judgment.

Before reviewing the specific items, it becomes necessary to consider some of the peculiar facts of this case, which bear, more or less, upon each of the several items of the account. Respondent

was the foreman of appellant's mine for several years: He was regularly employed, and was to be paid for his services at the rate of five dollars per day. He also kept a boarding house where the laborers employed at the mine boarded. A. J. Rhodes was the superintendent of the mine, and a large owner therein. He was also engaged in the general business of merchandising. Respondent bought most of his supplies at Rhodes' store. The question whether appellant is indebted to respondent in any of the amounts stated, depends, to a great extent, upon the nature of the business relations existing between respondent and Rhodes.

The theory of appellant is, and the testimony offered in its behalf tends to show, that respondent's accounts against appellant were transferred, or turned over to Rhodes, and that Rhodes had been paid in full by appellant.

The theory of respondent is; and his testimony tends to show, that he only turned over these accounts to Rhodes so as to cover the extent of his indebtedness to Rhodes and that the understanding was that appellant was to be responsible for the balance due him, and that the same has never been paid.

When this case was first presented to this court, there was no controversy as to the manner in which the business transactions between the respondent and Rhodes were conducted: Martin v. Victor M. & M. Co., 18 Nev., 306. But the testimony as now presented upon this point is different, in many of its phases, from that contained in the former record. Appellant, however, contends that the facts to be gleaned from the present record are substantially the same as in the former, especially as to the business relations between respondent and Rhodes. This position is sought to be maintained by a direct attack upon the veracity of respondent, it being claimed that no credit should be given to his testimony. It is argued that his testimony, on the last trial, "is self-contradictory and self-nullifying," and that he stands before the court "self-convicted of falsehood." It is claimed that his testimony, upon all the material matters, is in direct conflict with his testimony at the first trial, and it is charged that he was induced to make this change in his testimony on account of the previous decision of this court. There are many statements made in his cross-examination which are, to some extent, contradictory with his testimony-in-chief; and some portions of his testimony-in-chief are shown to be at variance with his testimony, upon the same points, at his former trial. But, after a careful examination of the entire record, we are unwilling to say that his testimony is unworthy of belief, or that, in our opinion, there is anything in the record to show that he has knowingly or willfully testified falsely in relation to any of the items of account. We think that his contradictory statements are to be accounted for by the peculiar complications arising from his business transactions with Mr. Rhodes, and by a failure upon his part to fully comprehend the nature of some of the questions asked him upon a tedious, searching and vigorous cross-examination, rather than upon any intentional design to misrep-

resent any of the facts. In considering his testimony, it must be remembered that appellant's affairs were so blended and mixed up with the business transactions of its superintendent and foreman that it was difficult for counsel, and by no means easy for this court, to explain the relations existing between them. The entire business between all of these parties seems to have been conducted in a loose, careless, and unsatisfactory manner. No regular books were kept by the superintendent. He took the vouchers, pay rolls and bills given to him by the foreman, and sent them to the office of the appellant in San Francisco, California. The foreman kept books; but, judging him by the record before us, he is not a success as a bookkeeper. He was, however, for six years the trusted friend and adviser of appellant. In him, at all times, it reposed the utmost confidence. He was considered and treated as an honest, worthy, faithful and confidential employee, and, as such, was entrusted with the management and control of appellant's mining property to a great extent, as the superintendent was seldom at the mine. The question, whether the superintendent kept any books, or whether appellant had any office at Belleville, is made the subject of attack upon the veracity of respondent, and furnishes an illustration of the conflict which exists between his testimony and the testimony of Mr. Rhodes. The facts are, that appellant had no office specially designated as such by signs or other outward marks. It conducted its business through its superintendent, in a room at his store. This room was, also, his private office, and in which he kept his store books.

Respondent testifies that this room was appellant's office, and that its books were kept there. On the other hand, Rhodes testifies that appellant had no office and kept no books. Respondent claims, upon this point, to have been deceived by Rhodes, and the result of the testimony seems to be that, as to some of the accounts, the respondent thought he was getting credit on appellant's books, when, in fact, the entries were made in the store books kept by Mr. Rhodes. It is, however, immaterial whether the books in which the entries were made were the books of Rhodes or the books of appellant. The controlling question is, whether appellant was to be liable to the foreman for the balance of his account over and above the amount due from him to Rhodes, or was it the understanding that he was to look to Rhodes for his pay.

Appellant had knowledge of the manner in which its business was conducted. It appears from the record that appellant was advised, from time to time, of the state of its accounts with respondent. For a period of four years after Rhodes closed his store the president of appellant, at various times, writes to respondent with reference to his accounts, making excuses for the delay in paying him and promising to pay him as soon as appellant realizes any money from the sale of its property. The superintendent spent much of his time in San Francisco. He was one of the directors of the corporation. The president was also a director. They were working together and had each other's confidence in the business of the corporation. In

relation to the question whether the corporation was indebted to respondent, or not, we take the following extracts from the letters of the president of the corporation to respondent, which were written subsequent to the time of the closing of Rhodes' store, in April, 1880:

"June 24, 1880. I received Mr. Kimball's letters, written at your request, and will state that in a short time I will get matters arranged so as to settle off with the men and keep them paid up promptly, and you will get all your money; it is perfectly safe."

"May 19, 1881. As to your account, you may rest at ease; both McCain and myself assure you that as soon as a sale is made and the money paid, the debts will be paid first of all before the stockholders get a dollar."

It does not affirmatively appear who McCain is; but it is fair to presume from the frequent reference to his name in connection with the president's, in efforts made to assist and protect Rhodes, that it is James S. McCain whose name appears as one of the directors of the corporation.

"June 10, 1881. Your letter received. * * * Now, I want a statement of your account in full against the company, also a full account of the men that have been employed in the mine since July, 1879. I want the pay rolls of each month by themselves, and the men that you have paid. State it, and *make out a bill against the company as paid by you.* * * * I think this will be a sale and *you will get all your money soon.*"

"July 12, 1881. Your letter of the seventh received. * * * As to the account, we have it all written out in shape, and will soon get the balance. That two thousand dollars, charged as cash to Victor, you did not say what it was for, but we will work it out. I told the secretary that you used it to pay off the men, and that you held their notes for it and when you come here for a settlement *you will present them all for payment.* Your not giving a list of those you paid money to, makes it harder for us to work out. We take the full pay rolls, deduct your own, and then find balance due, and if balance is paid we credit you. * * * If you charge us the two thousand dollars, and the order also, you will get the amount in twice. We will get it right and send it to you and *you will get all your money from the company.* I will show the account to Mr. Rhodes as soon as I get it out straight and tell him that you want the settlement with the Victor Company."

Next follows the letter reported in 18th Nev., 303, dated July 13, 1881.

"September 10. Your letter of the thirtieth received and I note all you say. First, about your account, *I promised you that the company should stand good to you for that; and that you can depend on.*"

"April 14, 1882. Your letter of April 10th this day received, I have read it all and note all you say. I note your remarks about the Kline matter and that I always have money. * * * You know * * * that we have done all in our power to pay all. * * * We sold the

property and the money was to come for it. I did not put up money, not a dollar, in the Kline matter; but it was put up by friends of the company. * * * It was impossible for me to send you any money. * * * *I do not forget my promise to you as to your account, and I understand all about it.* The money is promised by the fifteenth to pay everything up. When it comes you will be paid. * * * You have been the trusted man of the company and I hope and trust that you will do all you can to help us through our troubles and not make us more."

"March 31, 1884. Your letter received. * * * I am trying to get some money to send to you. * * * I told Mr. Rhodes that it was too bad that you was treated so, after standing by us as you had done."

On the twenty-second of March, 1881, Mr. Rhodes writes a letter to respondent which also sheds some light upon the disputed question of any indebtedness.

"Yours in hand. As regards my saying that the Victor did not owe you any money, you can tell those parties that it is a lie, I have never told any one anything of the kind. It is their own manufactory, and I don't think they ever heard any one say so; and if they and their kind would hold their tongues we would have had money for you long ago."

These letters explain themselves. We shall, therefore, proceed upon the theory that appellant is indebted to respondent in some amount, and that his testimony should be taken into consideration in determining the disputed questions at issue between these parties. A general objection is made to the allowance of any of the accounts for money advanced, or paid out, by respondent for appellant's use and benefit on the ground that there is no evidence showing, or tending to show, that appellant ever requested him to advance or pay out any money for its use or benefit; that the payments, if made, were made gratuitously; that no officer of appellant was authorized to request any one to advance money in its behalf or to sanction or ratify the acts of respondent and that his acts, in this respect, were never ratified by appellant.

Appellant, in its business transactions, of the nature revealed by the testimony in this case, must be treated the same as an individual engaged in like business. If its duly authorized officers, or agents, acting for it, had knowledge of, sanctioned or ratified the acts of respondent, in advancing money for its use and benefit, and appellant, with full knowledge of all the transactions, acquiesced in the acts and declarations of its officers and agents in their dealings with respondent, it should be held liable for the money so advanced by respondent. It cannot, under such circumstances, avoid this liability on the ground that such a course of proceeding was never authorized by its directors.

It is made manifest from the testimony that appellant had knowledge of the advances of money in its behalf by respondent. It received the benefit of these advances without protest or objection,

and, through its officers, repeatedly informed respondent that it would be made "all right," and that he should be repaid as soon as it could obtain the money. Respondent, among other things, testified as follows: "Many times I spoke to Mr. Rhodes of the money I had advanced to the men for the company. Rhodes said it was all right, and that I would be paid for the money I had thus advanced." Similar testimony was given in relation to each account where it is claimed advances were made.

On the twentieth of June, 1881, the president writes to respondent, and says: "Yours, with pay rolls and letters, received; the balance of your account, October 25th, 1879, $10,068.05, I cannot get at for books of company. *I think you had better send me your books by express.*"

On the twenty-third of June, 1881, another letter is written, stating: "In sending for your books, the other day, I should have stated more fully why I wanted them. * * * I wanted a full, detailed statement, to put on the books of the company, and *place your account to your credit on the books;* so that the money, when paid for the mine, if sold, can be paid out without delay. *You can arrange to have yours paid just as you like.*" On the first of July the president acknowledges the receipt of respondent's books. In August following, the respondent, as he testifies, had a conversation with the president and superintendent of appellant in San Francisco, California, and in reply to his request for a settlement, told him to go with the secretary of appellant, examine the accounts, and find the balance, and said "that everything that was done between the secretary and myself would be all right;" that the secretary and respondent examined the books and accounts, and found a balance to be due respondent of some ten or eleven thousand dollars, and that all the accounts sued for were in the books which they examined. In the light of all the testimony, we are of opinion that appellant must be held liable for the amounts of money which respondent at various times advanced for its use and benefit.

There is sufficient evidence to sustain the finding of the court allowing respondent two thousand two hundred and twenty-four dollars upon the first count in the complaint. Respondent testified as follows: "I had a settlement with A. J. Rhodes, the superintendent of the company, on the fourth of May, 1878, and a balance of two thousand two hundred and twenty-four dollars was admitted to be due me. * * * The balance of two thousand two hundred and twenty-five dollars was never paid to me by defendant or any one in its behalf."

We deem it unnecessary to discuss the controversy arising from the evidence as to when this account commenced, there being an admitted mistake of one year in the first statement of respondent and in the entry made in the books kept by him, which was corrected at the first trial, upon his cross-examination, further than to state that it does not affirmatively appear that there was any intentional de-

sign upon the part of respondent, to make any demand for an extra year's service, as claimed by appellant.

The evidence sustains the finding of the court allowing the two thousand dollar account. Respondent testified that he paid this money to the men; but when called upon to name the men and the amounts paid to each, he only showed a cash payment of about eight hundred and seventy-five dollars, and it is claimed that no more than this amount should, in any event, have been allowed. The record shows that the corporation was indebted to the men in the full amount. The men were indebted to respondent for board, and for cash previously advanced to them. In respondent's testimony, he says: "I paid the money myself to the men in coin checks of different amounts. * * * The men owed me board bills and cash besides, furnished to them, both for account of the company. I bring the men down to Rhodes. Mr. Rhodes had no money and the company had no money; I furnished two thousand dollars." The reasonable conclusion to be drawn from this testimony is, that, in furnishing this money he included the amounts due from the men to himself for board, and money previously advanced, and that it was the balance which he paid in coin checks to the men. The court only allowed seventy-six dollars of the three hundred and twenty-one dollar account, and no objection is made to this. The account of three hundred and forty-three dollars and sixty cents allowed by the court is objected to upon several grounds. It is claimed that it does not affirmatively appear that the judgments were regularly entered. This is immaterial. If it appears that respondent paid this money upon appellant's request, or that having paid it without request appellant subsequently ratified the act and promised to pay respondent the money, it cannot avoid the payment on account of any irregularity in the proceeding in the justice's court, or in the proofs as to the existence of the judgments. The record shows that respondent paid these judgments and the court's finding in this respect is fully sustained by the testimony.

The court allowed respondent six thousand nine hundred and seventy-five dollars, for one thousand three hundred and ninety-five days' work, at five dollars per day. As the mine was closed down on the eleventh of October, 1880, it is contended that respondent is not entitled to any wages as foreman after that date; that he is not, in fact, entitled to any wages; but if any amount is allowed it should be for a smaller sum than five dollars per day. Respondent relies upon the original agreement; upon the request of appellant for him to remain and watch the mine and property, and the further fact that no notice was ever given to him that his services were not needed or anything said about a reduction of his wages. The original agreement was that he should receive "five dollars per day right along, whether the mine paid or not." Respondent claims that he was recognized as foreman until 1882.

Rhodes, on behalf of appellant, testified that when the mine was closed down, in 1880, he had a conversation with respondent, and

"told him we could not keep a foreman there at that time. We both agreed that it was not right to keep a foreman there under wages; that he was to stop there, and he could stop in the Victor house without charge." When asked to repeat the conversation, he said: "I told him that the company could not afford to pay a man wages for staying there. He agreed to it; stated that he would stop there at the mine, and that there would not be any charge for it."

Respondent, when questioned by appellant's counsel, gave his version of the conversation with Rhodes, as follows:

Q.—"What did he, Rhodes, say to you?"

A.—"I asked him if he wanted me to stay there and take care of the property. They expected to have everything settled and start anew in a very short time."

Q.—"Is it not a fact that he told you to stay in the boarding-house and take care of it, and when they would start up again they would want you?"

A.—"No, sir."

He gave other testimony of like import. It affirmatively appears that he was frequently ordered by the president and superintendent to perform service at the mine, and that he complied with their requests.

We are of opinion that the court was justified, if it believed respondent's testimony to be true, to allow him five dollars per day for the time claimed after the mine was closed down. There is, however, a mistake in the computation of time. The whole number of days between May 4, 1878, and June 12, 1882, is one thousand four hundred and ninety-nine, and from this should be deducted one hundred and eighteen days that respondent admits being absent from the mine, leaving one thousand three hundred and eighty-one days, which, at five dollars per day, amounts to six thousand nine hundred and five dollars.

Of the ten thousand and seventy-two dollars claimed by respondent as having been paid to the men employed at the mine the court only allowed about six thousand dollars. With reference to this claim the respondent testified that he knew the corporation was indebted to the men in the several amounts paid by him, because he, as foreman, was authorized to employ and discharge the men, and that they could not receive pay for their labor without first obtaining a time check from him; that the corporation failed to pay the men, and that he paid them with his own money. He also introduced vouchers for the amounts which the court allowed. The greater portion of these vouchers were simply in the form of an account for so many days labor against appellant regularly receipted. Some were regularly receipted. Some were regular receipts acknowledging the receipt of the money from respondent "on account of labor performed for Victor Mill and Mining Company." It is argued that the first class of vouchers were immaterial, irrelevant and inadmissible in evidence, as they did not tend to prove that the money received was not paid by appellant, and that the other class, as to the

labor being performed for appellant, were to that extent "a self-serving statement and hearsay evidence." We are of opinion that all the vouchers produced by respondent were properly admitted in evidence, as they tended to corroborate his testimony that he had paid these amounts with his own money.

In connection with some of these accounts, it is claimed that appellant was misled and deceived by the acts of respondent, and the men at work under him, in signing the monthly pay rolls and delivering the same to the superintendent without receiving their money for the wages receipted for, and it is argued that respondent is, for this reason, estopped from asserting that the amounts of money as specified in these pay rolls was never paid by appellant. It is not shown that there was any collusion, or intended fraud, upon the part of respondent in relation to this matter. The evidence is that the pay rolls were receipted for at the special instance and request of the superintendant. Respondent testified as follows:

"I signed myself, and some other parties signed the pay rolls, at the instance and request of Rhodes, the superintendent. * * * He insisted to have the pay rolls signed. He said it would be all right. I said, Mr. Rhodes, that is not the way to do. * * * He said that would be all right; the company was good for it, the mine was good for it." If there was any misconduct, it was upon the part of appellant's superintendent, and if it was misled thereby, we do not think the respondent should be held responsible for the acts of the superintendent. But we are of opinion that the record shows that appellant had knowledge of the methods used in procuring the signatures of the foreman and laborers, upon the pay rolls, and that it was not misled, deceived or injured in this matter.

It is contended that the court erred in allowing respondent four hundred and ninety-two dollars; which he paid to Nicholas Kline, It appears that Kline subsequently commenced suit for the balance due him from the corporation, and in his complaint admitted that he had received from appellant "the sum of four hundred and ninety-two dollars for boarding, and the sum of two hundred dollars in cash."

Respondent, after testifying that he had paid this four hundred and ninety-two dollars, offered the following receipt as a voucher, to show that he had advanced this amount to Kline.

"$492.00 CANDERLARIA, September 2, 1880.

"Received from P. Martin, four hundred and ninety-two dollars on account of labor performed for Victor Mill and Mining Company.

"NICHOLAS KLINE."

Appellant objected to this receipt, "on the ground that it is immaterial and irrelevant, and that plaintiff is estopped from offering the evidence of any payment by him to said Kline, by reason of the judgment roll, already in evidence in the case of Kline v. The Victor Mill and Mining Company; for the reason that it is there adjudicated that defendant has paid four hundred and ninety-two dollars for board of said Kline, and the sum of two hundred dollars in cash,

and the further sum of sixty-nine dollars and ninety cents, the board of said Kline, making a total of seven hundred and sixty-one dollars and ninety cents. A judgment for the balance of all that he had earned to that time, the sum of one thousand two hundred and eighty-two dollars and ten cents, was, on the twenty-fourth of June, 1881, rendered in favor of said Kline for said amount, which sums included, as adjudicated in said judgment, the entire amount of the earnings of said Kline from said defendant * * * and the receipt is contradictory of the judgment, in that it is there asserted that four hundred and ninety-two dollars was paid by P. Martin on account of labor performed for the Victor Mill and Mining Company; whereas, *said judgment determined that it was paid by defendant.*"

The position of appellant, as claimed by this objection, is that notwithstanding the fact that this money was paid by respondent, he is estopped from recovering, because Kline gave appellant credit therefor. This objection is wholly untenable.

It is claimed that the court erred in allowing the sum of four hundred dollars, which respondent, in his examination in chief, testified he had paid to T. Plamenez. In his cross-examination, he gave testimony to the effect that he only paid Plamenez three hundred and ninety dollars, and it is contended that this is all that should have been allowed. But it appears that respondent, in testifying to the payment of the sum of four hundred dollars, included a store account of Plamenez for ten dollars, and, in relation to this account, upon his cross-examination, he said: "I fixed this thing with the storekeeper about the ten dollars."

An objection is urged against the allowance of the sum of three hundred and six dollars, paid to B. McMurray, and it is claimed that this allowance should be reduced to two hundred and twenty-five dollars, which respondent paid and obtained credit for upon Rhodes' books. The amounts which respondent obtained credit for on Rhodes' books varies from the real amount paid in many cases. In relation to this claim respondent offered in evidence a receipted account from McMurray for three hundred and six dollars for seventy-six and one-half days labor performed for the Victor M. & M. Co., "which plaintiff testified, was due from defendant to said McMurray, and was paid by said plaintiff to McMurray with plaintiff's own money."

There are divers and sundry other objections to the rulings of the court in admitting testimony, and in the allowance of the accounts, to which we deem it unnecessary to make special mention. It is enough to say that we have carefully examined the same and find them to be without any substantial merit. There being a direct conflict of evidence upon all the material points, it is our duty to sustain the findings of the court.

The judgment of the district court is modified by deducting therefrom the sum of seventy dollars, and as so modified the judgment of the district court is affirmed.

LEONARD, J., DISSENTING. I think the court erred in allowing five dollars a day from and after work was suspended in the Victor mine. Giving to his testimony all that the language imports, it amounts to this, that he was originally employed to act as a foreman at five dollars a day; that when the company ceased work he was not formally discharged and while staying in the company's house free of charge, when asked by the president, by letter, he sometimes performed trifling services which any friend might well do for another.

On the contrary, Mr. Rhodes, defendant's superintendent, subsequently testified that when the mine was closed he had a conversation with respondent in relation to this matter; that he told respondent the company could not afford to keep a foreman or pay a man for staying there; that respondent agreed to it and stated that he would stop at the mine and would not charge for it.

Respondent did not contradict Rhodes' testimony, and the trifling services performed by him—such as showing a few visitors about the mine—were such as any person ought to have done, situated as he was after agreeing with Rhodes that he would remain without compensation, until work should be resumed. Before Rhodes gave his testimony, respondent testified that when the mine was closed, Rhodes asked him if he wanted to stay there and take care of the property, the Victor mine, and that it was not a fact that Rhodes told him to stay in the boarding house and take care of it, and when work should be resumed the company would want him.

After respondent rested, Rhodes testified for appellant as above stated.

In rebuttal, respondent did not deny that he had entered into the agreement stated by Rhodes, and to my mind his former testimony did not amount to such denial.

SUPREME COURT OF WASHINGTON TERRITORY.

LEMON ET AL. *v.* WATERMAN, ET AL.

Filed August 4, 1885.

MARRIED WOMAN'S PROPERTY—EXEMPTION FROM LIABILITY FOR HUSBAND'S DEBTS.—The effect of the act of April 28, 1854, providing that "all real and personal estate to which any married woman shall hereafter become entitled to, in her own right, and all which may at the time of her marriage, belong to her * * * shall not be liable to attachment for or execution upon, any liability or judgment against her husband, so long as she, or any minor heir of her body, shall be living," is to create an exemption of the husband's estate in the wife's property, in favor of the wife.

THE SAME—WHEN INVENTORY OF SEPARATE PROPERTY NEED NOT BE FILED.—The provisions of the act of December 2, 1869, requiring a married woman to file an inventory of her separate property, in order to exempt it from seizure for her husband's debts, has no application to property acquired by the wife prior to the passage of such act.

QUIETING TITLE—REAL PROPERTY NOT IN ACTUAL POSSESSION.—Where real property is not in the actual possession of any one, an action to quiet title thereto may be maintained, under section 551 of the code, although the claim or estate sought to be quieted be absolutely invalid.

APPEAL from the district court. The opinion states the facts.

C. W. Hartman, for the appellants.

McNaught, Ferry, McNaught & Mitchell, for the appellees.

TURNER, A. J. This is a suit in equity to remove a cloud from the title to certain real property in the city of Olympia, described in the complaint. It was heard in the court below upon the pleadings and the evidence, and, after hearing, the judgment was that the complaint be dismissed.

The plaintiff prosecutes an appeal to this court.

The principal question for our determination arises upon the findings of the court below, and it is unnecessary to notice the pleadings, except in a particular to be hereafter mentioned.

Some question is made by the appellees as to some of the findings of fact, but, after a careful scrutiny of the evidence, we think the findings substantially correct.

The second and third findings were, in substance, as follows:

2. That on the second day of February, 1867, Philip D. Moore and Phoebe H. Moore were husband and wife; that, on said day, Phoebe H. Moore received, from William Cock and wife, a deed of conveyance to a lot or tract of land, which included the property described in the complaint, which tract of land then became the separate estate of said Phoebe H. Moore.

3. That, on the eighteenth and twenty-seventh days of December, 1883, by good and sufficient conveyance, the property described in the complaint was conveyed to the plaintiffs by said Philip D. Moore and said Phoebe H. Moore. The fourth finding, to which the foregoing are but explanatory, and upon which the question in the case arises, was as follows: "That said Phoebe H. Moore was, on the twenty-fourth day of April, 1876, the wife of Philip D. Moore, and had not, nor has ever caused to be recorded as required by law, an inventory of her separate estate, including the lots and lands herein-

before described, in the office of the auditor of Thurston county, and on said day, the said sheriff of Thurston county, Washington territory, sold all the right, title and interest of Philip D. Moore, in said lands to defendants herein, under and by virtue of an execution upon a judgment against said Philip D. Moore, upon a debt contracted by said Philip D. Moore, in the year 1874. That thereafter, said sheriff duly executed a deed of said interest to defendants, who had caused the same to be recorded in the office of the county auditor of said Thurston county, at pages 184 and 185, of volume 13, deeds. That said lands at the commencement of this action, were vacant and unoccupied, and the said deed now remains of record in said office, and is regular in form upon its face, and the defendants are the owners of an estate in the said lands, by virtue of the said sheriff's sale and deed. Under the common law, which regulated the subject in this territory, at the time Phoebe H. Moore acquired the lands in controversy, her husband was vested with a freehold estate in the lands, for their joint lives, and upon the birth of a child during coverture, with a freehold estate for his own life. The estate might be levied on and sold on execution at the common law for the husband's debts: Schouler on Husband and Wife, sections 167 and 168, and authorities there cited; Starr v. Hamilton, Deady, circuit court reports, p. 268.

But, at the time this property was conveyed to Mrs. Moore, the common law, as stated above, had been modified by statute in this territory.

In the civil practice act, passed April twenty-eighth, 1854, Laws of Washington, 1854-1856, p. 129, it was declared:

"Sec. 252. All real and personal estate to which any married woman shall hereafter become entitled to in her own right, and all which may, at the time of her marriage, belong to her, and all the issues, rents and profits of such real estate, shall not be liable to attachment for, or execution upon, any liability or judgment against her husband so long as she, or any minor heir of her body, shall be living: *Provided*, That her separate property shall not be exempt from attachment or execution, where the debts were owing by the wife, previous to marriage, or may have been contracted for her benefit."

This law has been re-enacted in each of the several revisions of the laws of this territory, and may now be found as sections 341 of the code of 1881.

It is insisted by the appellants that this provision of our statutes was intended to make the property of the wife, owned or acquired by her as defined by the statute, her separate property, as that term was understood at common law, and free from the marital rights of the husband. A somewhat similar provision in the constitution of Oregon has been given this meaning by the supreme court of Oregon: Brummett v. Weaver, 2 Oregon, 168.

This construction was followed, and its reasoning elaborated, by Deady, district judge, in Starr v. Hamilton, Deady's Reports, U. S. Courts, 1859-1869, p. 268.

We think, however, the better opinion, in the construction of our statute, is that it creates an exemption of the husband's estate in the wife's property in favor of the wife.

The provision is found both in the civil practice act of 1854 and in the code of 1881, in the chapter relating to exemptions, and under the title "Exemptions." It does not in terms do more than create an exemption, and no good reason exists for extending its import beyond its terms. An exemption of one person's property in favor of a different person is an anomaly, but when the peculiar estate of a husband at common law in property acquired by the wife is considered, and the reasons of the law for creating such estate, the exemption will be seen to be an eminently just one, and one bearing a useful and perfectly consistent part in the scheme of the law.

The modification, then, in the common law made by our statutes at the time of the acquisition of this property by Mrs. Moore was to exempt the estate of the husband therein from seizure and sale on execution for the husband's debts.

Did the fact, as found by the court, that Mrs. Moore had failed to record an inventory of her separate estate prior to the levy of execution by the sheriff upon this property divest her of the right to insist upon this exemption? The lower court so found, and rendered judgment accordingly.

The law concerning the estate of the husband in the wife's property remained in this territory, as heretofore stated, until the passage of the act, approved December 2, 1869, entitled "An act defining the rights of husband and wife:" Laws of Washington, 1869–1871, p. 318.

This act established the system of community property between husband and wife, the incidents of which are well known to the bar and the public. It is hardly necessary to say that this act, whatever its terms, did not operate to divest the estate of either the husband or the wife in the property held by them, or either of them, at the time of its passage. But there are provisions in the act which it is claimed have the effect of requiring the wife to do certain things, if she would insist on the exemption in her favor made by the act of 1854, and which cuts off exemption if she fail to do them.

Section 3 of the act requires the wife to make a full and complete inventory of her separate property, and to acknowledge and record said inventory in a manner pointed out by said section.

Section 5 provides: "The filing of any such inventory in the auditor's office shall be notice of the title of the wife, and all property belonging to her included in the inventory, as well as any money in specie not so included, shall be exempt from seizure on execution for the debts of the husband; and she shall be deemed to have waived the exemption from such seizure on execution of all property belonging to her not included in any such inventory, other than money in specie."

We think these provisions must be construed as having reference only to property to be affected by the community system which the act of the legislature brought into existence, and hence, as having no reference to property held by the wife in her own right before the passage of that act.

The system was not a new or untried one. It had been in existence for many years in California, Texas and Louisiana. Its weakness and its strength were known. The right of husband and wife under it, and of creditors of one or both, had been discussed and determined by the courts. We may well conclude that the provisions of the system in question were intended to have a specific application to property to be affected by the system, if we can find a useful purpose in connection with that system to which they may be applied.

It is settled by the courts, in construing the community property law, that property acquired by the wife during coverture, the title to which is taken in her name, is *prima facie* common property, and therefore subject to the husband's community debts. This presumption may be rebutted by the wife, who may show the true nature of her title. It will be readily seen that a wide door is thus thrown open for fraud upon creditors, to say nothing of the field left for future litigation between heirs, devisees and assignees, claiming adversely under the husband or wife.

Sections 3, 4 and 5 of this act, we think, were intended to close this door.

It was competent for the legislature, as to after-acquired property, to give full effect to the presumption that such property, even though title to it were taken in the name of the wife, was community property, unless the wife gave the public notice of her separate title. It was not competent for the legislature to attach such presumption to property acquired by the wife before the passage of the act, her enjoyment of which, with all the incidents thereof provided by law at the time of its acquisition, is preserved by constitutional guarantees.

Section 5 of the act of 1869 cannot be construed when read in connection with the other provisions of that act, as a mere exemption from sale in favor of the wife of the estate of the husband in the wife's property, as in the act of 1854.

The act of 1869 destroys that estate.

Therefore, if said act has a retroactive effect, it permits the wife's property to be sold for the husband's debts. As before stated, this might be permitted as to property acquired by the wife after the passage of the act of 1869, and not inventoried by her, but it could not be permitted as to property held by her before the passage of that act.

Our conclusion is, that full effect must be given in this case to the exemption provided by the act of 1854 regardless of the failure of the wife to make and record an inventory of her property, and the failure upon the part of Mrs. Phoebe H. Moore to make and file such

inventory, as found by the court below, did not bar the plaintiffs from the relief prayed in the complaint.

The defendants took no interest in the lands in controversy by virtue of the conveyance from the sheriff.

The appellees insist, however, that the complaint does not state facts sufficient to constitute a cause of action, and that the judgment of dismissal was correct on that ground.

The complaint sets up the sheriff's deed to appellees; alleges that the same is a cloud upon the plaintiff's title, and prays that the same may be declared void and of no effect. We have seen that the appellees took no interest by virtue of the sheriff's deed, and that the same was null and void.

This being so, there is no cloud upon the plaintiff's title according to the principles of equity, and the complaint fails to state a cause of action: Pomeroy's Equity Jurisprudence, vol. 3, sec. 1,399, and authorities cited.

Appellant's rely upon section 551 of the code as enlarging the equity jurisdiction in such cases. That section provides, among other things, that when "real property is not in the actual possession of any one, any person, or private or municipal corporation claiming title to any real property under a patent from the United States, or during his or its claim of title to such real property under a patent from the United States for such real estate, may maintain a civil action against any person or persons, corporation or association, claiming an interest in said real property or any part thereof, or of any right thereto adverse to him, them or it, for the purpose of determining such claim, estate or interest."

We think the statute must be given the effect claimed for it, and that where the property is not in the actual possession of any one, as in this case, the jurisdiction of the court can be maintained notwithstanding the absolute invalidity of the claim or estate against which the true owner is moving.

In this case the complaint does not show that the appellees are claiming the property under their void conveyance. The evidence, however, shows that fact, and we think the appellants should now be permitted to amend the complaint to correspond with the evidence in this respect.

The judgment of the lower court is reversed and the cause remanded, with directions to permit an amendment of the complaint, and to then proceed to judgment in accordance with this opinion.

GREENE, C. J., and WINGARD, A. J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 7,790.

PELLIER *v.* GILLESPIE ET AL.

In Bank. Filed October 9, 1885.

AFFIDAVIT OF SERVICE OF SUMMONS—RESIDENCE OF DEFENDANT.—Where the affidavit of service of summons states that the defendant was served in a certain county, it will be presumed that he was a resident of such county.

FORECLOSURE OF MORTGAGE—PERSONAL JUDGMENT AGAINST GRANTEE OF MORTGAGOR.—In a complaint to forelose a mortgage, an allegation that the grantee of the mortgagor covenanted and agreed to pay the mortgage debt and discharge the mortgage lien, is sufficient to sustain a personal judgment against him.

THE DESCRIPTION OF THE MORTGAGED PROPERTY CONSIDERED, and held sufficient.

APPEAL from a judgment of the superior court of Santa Clara county, entered in favor of the plaintiffs. The facts are stated in the prior report of the case in 4 West Coast Rep., 500.

Houghton & Reynolds, for the appellants.

James R. Lowe and *Rhodes & Barstow*, for the respondent.

MYRICK, J. When this cause was before the court in department, an opinion was filed as follows:

"The objection that the affidavit of service of summons is fatally defective, because it does not state that the appellant, on whom the summons alone was served, and the defendant, on whom a copy of the complaint was served with the summons, were residents of the same county, is overruled, on the authority of Calderwood v. Brooks, 28 Cal., 153.

"The allegation that appellant covenanted and agreed to pay the mortgage debt and discharge the mortgage lien, is sufficient to sustain the judgment.

"There is a sufficient description of the premises:" 4 West Coast Rep., 500.

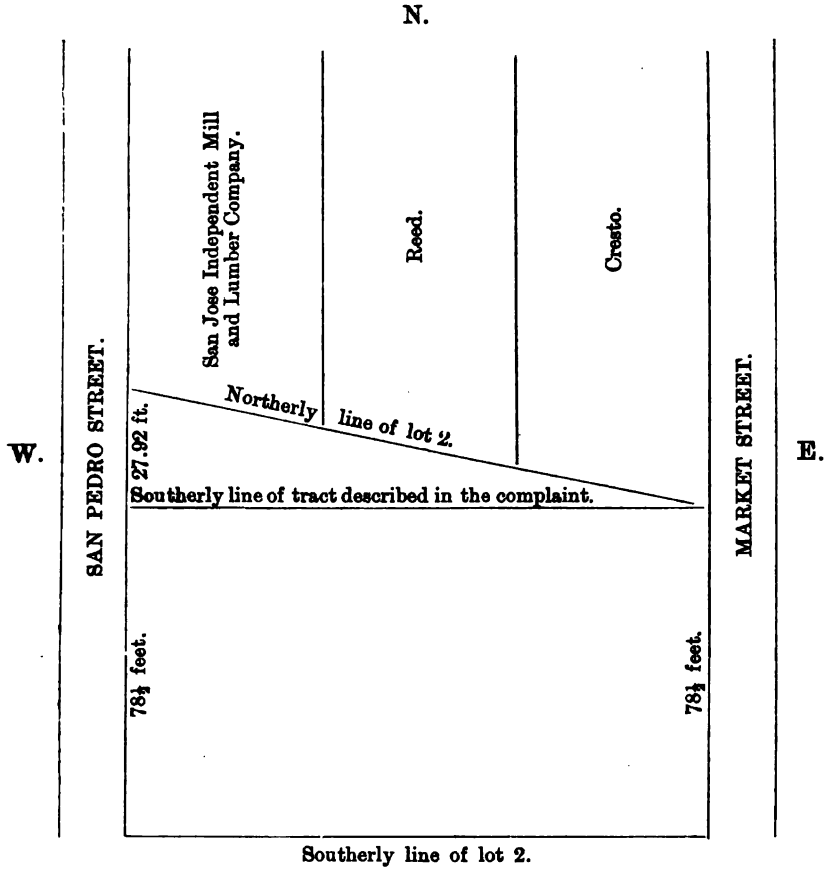
After hearing by the court in bank, we see no cause for changing the views expressed in department. We will, however, add, as to the sufficiency of the description of the premises, that all reference to lot two and map may be omitted, and a description be found. Let the description as found in the mortgage and decree be slightly transposed, lines and distances given as stated, and the description may read thus: Beginning at a point on the easterly line of San Pedro street, twenty-seven and ninety-two one hundredths feet southerly from a point where the southerly line of the lands of the San Jose Independent Mill and Lumber Company strikes said easterly line of San Pedro street, and running from said point at right angles with said street to the westerly line of Market street, thence along the line of lands of Cresta, Reed and San Jose Independent Mill and Lumber Company to said line of San Pedro street, and thence along said line of San Pedro street southerly twenty--seven and ninety-two one-hundredths feet to place of beginning. Can we say this description embraces no land, and the sheriff could place no one in possession of any premises? Can we say the line

back from Market street is on the same line approaching Market street? We think not.

The judgment is affirmed.

MORRISON, C. J., MCKEE J., and THORNTON, J., concurred.

MCKINSTRY, J., CONCURRING. I concur in the judgment. The mortgage and decree contain a good description.



Treating the contract of the defendants, the San Jose Independent Mill and Lumber Company, as in equity, and in view of section 726 of the code of civil procedure, a contract to indemnify the mortgagor against the payment of any deficiency that might arise under a foreclosure and sale, it was an agreement of the benefits of which the mortgagee could avail himself upon the principle of subrogation: Biddle v. Brizzolara, 64 Cal., 354.

I agree, the affidavit of service was sufficient.

ROSS, J., concurred.

Nos. 9,560, 9,737.

ESTATE OF SKERRETT, DECEASED.

In Bank. Filed October 9, 1885.

WILL—DEED—COPY OF DEED AND LETTER, WHEN AN OLOGRAPHIC WILL.—Prior to his death deceased executed an ordinary deed of bargain and sale of certain land to his sister. The deed was properly acknowledged and dated, and witnessed by two witnesses, but never delivered, and was not entirely in the handwriting of deceased. Among his papers was found, enclosed in the same envelope, a copy of the deed, and a letter to his sister, each in the handwriting of the deceased. In the letter the following was written: "We all know life is uncertain; and we don't know the moment we may be called away. * * * I, therefore, want you to know you are provided for under any circumstances. * * * My intention is to provide for you while I live, the same as I have always done, and, hereafter, if it should please God to call me away, you will have your own property to depend on, sufficient to make you independent while you live." *Held*, that the deed itself was inoperative as a will, as the deceased did not declare to the witnesses that it was his will. That the copy of the deed, and the letter, taken together, showed an *animus testandi*, and should be admitted to probate as an olographic will.

APPEAL from orders of the superior court of the city and county of San Francisco. The opinion states the facts.

A. H. Loughborough, for the appellant, in No. 9,560.

Joseph Hutchinson, *Winans & Belknap*, *P. G. Murphy*, *M. C. Hassett* and *Wright & Cormac*, for the respondents.

Joseph Hutchinson, *Lloyd & Wood*, *M. C. Hassett*, *P. G. Murphy*, for the appellant, in No. 9,735.

A. H. Loughborough, for the respondents.

MYRICK, J. These appeals will be considered together. No. 9,560 is an appeal from an order refusing to admit an instrument to probate as the will of the deceased; and No. 9,735 is an appeal from an order admitting an instrument to probate.

The following appears in the bill of exceptions in appeal No. 9,560.

"Be it remembered that on the thirteenth day of September, 1883, there was filed with the clerk of said superior court a certain instrument in writing which was in words and figures following, to wit:

"This indenture, made this twenty-sixth day of April, one thousand eight hundred and eighty-one, between Nicholas Skerrett, of the city and county of San Francisco, state of California, party of the first part, and Anna J. Skerrett, his sister, of London, England, party of the second part,

"Witnesseth: That the said party of the first part, in consideration of the love and affection which the said party of the first part has and bears unto the said party of the second part, does by these presents give, grant and confirm unto the said party of the second part, and to her heirs and assigns forever, that certain lot [here follows description of real estate], together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversions, remainder and remainders, rents, issues and profits thereof, to have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, and to her heirs and assigns forever.

"In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written."

"*My dear Anna*: I have for a long time been thinking of executing this document. We all know life is uncertain, and we don't know the moment we may be called away. Both you and myself may live for many years to come, yet we know not the time. I therefore want you to know you are provided for under any circumstances.

"Now, I want to explain the particulars: This deed, which I send you a copy of, is all regularly made out and witnessed before a notary public. Nothing else necessary but to have it recorded, then it becomes your property, which can be done any moment, if necessary. My intention, however, is to provide for you while I live, the same as I always have done; and hereafter, if it should please God to call me away, you will have your own property to depend on, sufficient to make you independent while you live. I must now conclude, having no more to say, and am joined by Mr. Dixon in wishing you health and happiness.

"Your affectionate brother, N. SKERRETT."

A witness testified as follows:

"After Mr. Skerrett's death, myself and Captain Lees examined his box in which his deeds and other valuable papers were consigned, to discover whether there was any other will than the one produced here. I did not see anything that had reference to that except that, and I found no paper purporting to be a will. I found in the drawer of his desk an envelope addressed to his sister Anna, containing a letter and copy of deed to her. I found in the tin box before mentioned, in the lower part of the same desk, a deed from him to her, acknowledged before a notary. This deed was in an envelope, endorsed in the handwriting of Nicholas Skerrett, 'Deed of Gift—Nicholas Skerrett to Anna Skerrett.' Neither of these envelopes was sealed. [The witness is here shown the said instrument, which was filed herein for probate as aforesaid.] This is the paper which I found in the drawer of Mr. Skerrett's desk, enclosed in an envelope, addressed to his sister Anna. I have often seen him write, and I know his handwriting. The whole of this instrument is in the handwriting of Nicholas Skerrett, and it is his signature subscribed at the end. The address on the envelope was also written by him."

It was also in evidence that the sister referred to, Anna J., was in indigent circumstances, and that the deceased had made remittances to her for her support. The deed of gift which was referred to was executed (except as to delivery) and was acknowledged; it was not delivered, but was found in a box of the deceased. A witness testified that he suggested to the deceased that he should send the deed to the sister, to which deceased replied, "Well, you know she will have it, and you know she will have abundance."

The court found that the instrument (copy of deed and letter) was entirely written and signed by the hand of the deceased, that it

was not dated, and was not a will; therefore the court refused its probate.

In the case presented in the appeal, No. 9,735, the deed itself, acknowledged as a deed and witnessed (not the copy and letter), was offered for probate. The court found its execution by the deceased in the presence of two witnesses, that he declared the same to be his will, that they signed the same in his presence and at his request, and admitted the same to probate.

We are of opinion that the order in each case was erroneous. The deed (proposed in 9,735) was a deed of gift, and contained no words of testamentary character. It was invalid as a deed, because not delivered; it was not a will, because it expressed no design to be other than a deed. The evidence was insufficient to show its execution as a will. It was not olographic, and the evidence was insufficient to show that the deceased declared to the witnesses that the paper was his will. The instrument proposed in No. 9,560, taken as an entirety, should have been admitted. It was written entirely by the hand of the deceased; it was signed by him, and a date appears at the commencement. Neither the copy of the deed nor the letter, taken by itself, constitute a will. The one is not testamentary in its character; the other has no date; but, taking them together, as the deceased left them, forming one document, it is complete. The first part furnishes the date and the latter the testamentary character. We think the following words clearly show an *animus testandi*, viz.: "We all know life is uncertain, and we don't know the moment we may be called away. * * * I, therefore, want you to know you are provided for under any circumstances. * * * My intention is to provide for you while I live, the same as I have always done, and hereafter, if it should please God to call me away, you will have your own property to depend on, sufficient to make you independent while you live."

Doubtless, the deceased had it in his mind, when he executed the deed, to send it to his sister at some time, thus vesting the title in her in his lifetime; but, for some reason, he retained it—perhaps so that he could sell the property if he should desire. But that he intended that she should have the property upon his death, if not sold by him, is to us very clear.

Such being the case, and the instrument being executed with the formalities required by law, it is entitled to be admitted to probate.

The orders and motions in both appeals are reversed, and the matters are remanded with directions to the court below to refuse probate of the deed by itself, and to admit to probate the copy of deed and letter, being the instrument referred to as proposed in appeal No. 9,560.

McKEE, J., MORRISON, C. J., THORNTON, J., and McKINSTRY, J., concurred.

No. 11,090.

HARRIGAN v. BOLTE.

Department Two. Filed October 9, 1885.

AN APPEAL WILL BE DISMISSED IF THE NOTICE THEREOF IS NOT SIGNED by the attorney of record of the appellant.

MOTION to dismiss an appeal from the superior court of the city and county of San Francisco.

R. Percy Wright for the appellant.

C. H. Parker, for the respondent.

BY THE COURT. Motion to dismiss an appeal on the ground that the notice is not signed by the attorney of record. We do not consider the question an open one in this court.

Appeal dismissed on the authority of Prescott v. Salthouse *et al.*, 53 Cal., 221.

No. 8,849.

REYNOLDS v. REYNOLDS.

Department Two. Filed October 10, 1885.

REVERSAL OF JUDGMENT—REPAYMENT OF MONEY PAID UNDER.—When judgment is reversed on appeal, an order, under section 957 of the code of civil procedure, for the repayment of money, will not be granted, unless it appears that the money was paid after, and in consequence of the judgment appealed from.

MOTION for repayment of money. For the opinion in which the judgment was reversed see 6 West Coast Rep., 57.

Langhorne & Miller, for the motion.

J. P. Hoge, for the respondents Sullivan and Whittemore.

MYRICK, J. Motion for an order for the repayment of money, under section 957, code of civil procedure.

When the case was before us on appeal from the judgment: 6 West Coast Rep., 879; we reversed that part of the judgment which directed the payment of one thousand dollars counsel fees by the defendant to the attorneys for the plaintiff, the action being for a divorce.

It does not appear, from the affidavits used on the motion, that the money was paid after, and in consequence of, the judgment appealed from. If the money was paid in consequence of an order made prior to the judgment, such order was not appealed from.

Motion denied, and order staying remittitur vacated.

MORRISON, C. J., concurred.

THORNTON, J., CONCURRING. I concur in the denial of the motion herein on the ground that the motion authorized by section 957, code of civil procedure, is one against a party to the action, and not one, as this is, against the attorneys of a party.

[SUPPLEMENT.*]

SUPERIOR COURT, COUNTY OF SONOMA, CALIFORNIA.

COLTON *v.* STANFORD ET AL.

G. Frank Smith, Stanly, Stoney & Hayes, D. M. Delmas, and *W. T. Wallace,* for the plaintiff.

S. W. Sanderson, Creed Haymond, McAllister & Bergin, Garber, Thornton & Bishop, and *L. D. McKisick,* for the defendants.

TEMPLE, J. This action is brought to rescind a contract made by the plaintiff as executrix and general legatee of David D. Colton, with the individual defendants, August 27, 1879.

This was a settlement made by such defendants, acting for various corporations in which Colton had been a stockholder, and had held various official positions, with the estate of Colton. It was also an agreement by which such defendants acquired from the plaintiff certain stocks and bonds.

It is here charged that this contract was obtained from her by fraud, both actual and constructive, through misrepresentations, concealment, undue influence, and under mistake both of law and fact.

The pleadings are voluminous, and present many issues of fact. It has been necessary to investigate in great detail the affairs of numerous corporations having large properties widely scattered, and in general all the important transactions of the defendants and their associates for many years.

Whenever an issue of fraud is on trial wide latitude is necessarily allowed, for such charges are largely proved by inference. The door for the admission of testimony was still more widely opened here, for the plaintiff was allowed to show the relations which had existed between her husband and the individual defendants by evidence of the manner in which they transact their business and how they had built up and managed their many railroads and other properties.

In the difficult task of sifting this immense mass of evidence and arriving at correct conclusions from it, my sense of responsibility is greatly lessened by the conviction that in this particular case it is easy for either party to have every issue of fact and law fully considered by a higher tribunal with every advantage possessed by the trial court. For, vast as is the volume of testimony, and numerous and complicated as the issues are, and widely as counsel differ as to the effect of the testimony, there is no substantial conflict in it.

The first question naturally is, what issues are presented by the pleadings? The complaint commences with the averment that long

[* In view of the great public interest manifested in this case, and in compliance with the request of numerous members of the bar, the publishers of the West Coast Reporter herewith present to their subscribers the full text of the opinion of Judge Temple.]

prior to October, 1871, the individual defendants, and Mark Hopkins, had been associated, and were carrying on business together as copartners, as common carriers, in constructing, leasing, equipping and operating railroads and steam vessels; owning and operating coal mines and furnishing railroads and steam vessels with supplies, and in various other enterprises. That the business was carried on by means of various corporations, organized by them, as deemed requisite from time to time, or of which they obtained control, and in each and all of which they owned and held either the entire, or a large majority of the stock, and were the directors, or had these positions filled by their servants, selected by them for that purpose. That, in consequence of the use of the corporate agencies, and their manner of doing business, they had no firm name or partnership capital stock designated as such, but the different branches of their business were carried on in the names of the respective corporations used by them, and the individual interests of the corporation were measured by the amount of stock held by each of them in the respective corporations, and the profits paid and divided to each partner were paid as dividends on the shares of stock held by each, and by way of salaries paid them as officers of the corporations.

That, on the fifth day of October, 1874, owing to the increase of their business, they desired another partner, and so agreed with Colton that he should be a member of the partnership, and be associated with them as they had before been associated with each other; and to effectuate and carry into operation that agreement, they executed an agreement in writing, exhibit A, and Colton gave his note as provided in the agreement.

From that time, the parties became partners, carrying on business together through the same and similar agencies as previously by others; and, during that time, Colton put in large sums of money, and devoted the entire of his time, skill and abililty thereto.

Hopkins died on March 29, 1878, and the survivors carried on business after his death as before.

That while they so carried on business together, they assumed and sustained relations of peculiar and intimate personal trust and confidence, each toward the other, and to the business, and had confidential information and control, each over the affiairs, business and property of the others connected with such business; and a warm personal friendship existed between them.

The complaint then proceeds to complete the charge of fraud, duress and undue influence against the defendants, but there are no other facts alleged from which it could be claimed that the relation of the parties was fiduciary. This is important, for the chief complaint is, that defendants owed to plaintiff certain duties as trustees, which in the negotiations and compromise, they violated or failed to perform, and that they took advantage of the relation to extort unfair terms from her.

It is claimed by the defendants' counsel, that the only relation alleged is that of partnership, and that we cannot consider under

these allegations any other relations of trust, although the evidence properly admitted on other grounds would be sufficient to establish such relation.

It is further contended that the partnership relation not being proved in this case, and no other fiduciary relation averred, the impeached transaction must be regarded as one between strangers.

I do not so understand the rules of pleading. The plaintiff is required to state the facts which constitute his cause of action. If the facts thus stated entitled him to the relief demanded, he will, upon due proof, recover, although he may have in some respects misapprehended the legal effect of such facts. And it seems of little consequence if having stated facts which show a fiduciary relation he has misnamed that relation.

The plaintiff here has set out generally the business carried on and the mode of conducting it, the preceding contract to give their services and the mode of dividing the profits. Evidently from these facts the court will infer the relations of the parties. And these material matters being stated it is difficult to see how defendants could have been misled.

It is also averred in the complaint, that, it having been agreed that Colton should become a partner to effectuate and carry out that agreement, exhibit A was executed, and Colton gave his note, etc. It is now contended that we must look to this contract, exhibit A, alone, to determine the relations which existed between the parties to it. Turning to that contract we find that by it the individual defendants and Mark Hopkins, sold to Colton certain stock, and that Colton agreed to give his services in the business and management of the business interest of such corporations as all should be interested in, and assume certain liabilities.

It seems very singular, to begin with, for A to contract with B that he will serve C, and at a fixed compensation, without reference to the wishes of C. When we look clearly at this agreement, or rather, when we seat ourselves in their seats and take the contract by its four corners, and read it, we find that the parties did not intend to become the mere employees of certain corporations. It was really intended as an agreement to stand in together and control such corporations in the personal interest of the parties to the agreement.

The contract does not specify the services, and evidently they were to serve each other, and in such manner and in pursuance of such policy as they should agree upon from time to time among themselves. The entire understanding was not reduced to writing, and we do not allow plaintiff to add to or vary the terms of the writing when we admit proof of their actual relations.

The same method of reasoning, which shows the fallacy of plaintiff's claim, that the only trust relation averred is a partnership, will dispose of the claim that no fraud is alleged except actual fraud, and, therefore, she can base no claim for relief upon proof of constructive fraud. Here, too, the essential matters are the facts, and

if she has alleged more than she has proven, she still must have her decree if the facts which are averred and proven entitle her to it.

If these amount to constructive fraud their force is not impaired because of the added circumstances of an actual interest which has not been proven. There is much more force, however, in my opinion, in the claim of defendants that many of the charges of fraud upon which plaintiff now seeks to recover are founded upon facts not only averred or alluded to in the pleadings, but some of them upon facts concerning which no such claim was indicated during this lengthy trial; that really the defendants have not been heard upon some of the issues of fact upon which it is now sought to base a decree against them; have had no opportunity to explain them, to show that plaintiff knew all about them, or that they have no weight in inducing the contract.

No rule is better established in this state than that a plaintiff, claiming relief on the ground of fraud, must specify with some particularity the facts upon which he relies to prove the charge. This rule was happily stated by one of the counsel for plaintiff during the trial.

"Now, the plaintiff, proceeding against the defendant upon the grounds of fraud, either actual or constructive, willful or legal merely, by this proceeding is compelled, by well understood rules of pleading, to specify in her complaint the particular facts upon which she relies to impeach the transaction for fraud. She is compelled to state accurately, and somewhat minutely, the circumstances of fraud. As your honor well understands, it would not have been sufficient for the plaintiff to come into court, and, relying upon fraud, to have merely stated fraud in general terms. She must state it specifically. She must state particular facts. She must state particular relations. She must state particular violations of duty. Then, having done so, the plaintiff has selected her own battle-ground. She has selected her own weapons. The defendants are purely upon the defense, and upon the ground thus selected, and with the weapons thus chosen, the battle of fraud or no fraud is to be fought. If the plaintiff fail to prove the specific circumstances of fraud which she has alleged, her case fails. It is of no avail to her that there may be other grounds of fraud; that had she selected other weapons, she might have successfully attacked this transaction. She must stand or fall by the allegations contained in this complaint."

It is true, judgment is sometimes entered upon a state of facts different from those in the complaint, and the parties are allowed to amend so that the findings will correspond with the issues made by the pleadings.

If a different version of the transaction is set out in the answer, it may be adopted if it will be sufficient in law to warrant the plaintiff's claim for redress. So, where the allegations sufficiently indicate the transaction and the acts which are said to constitute fraud, but these are inaccurately set out in some of their details.

Here, notwithstanding the inaccuracies, the defendant has been made aware as to what issues he must come prepared with proofs.

So, too, in other cases, however widely the facts may differ in detail, if their general effect is the same, and the court is able to see beyond all question that the defendant has not been misled to his injury, plaintiff may recover. Generally, in this class of cases, the pleadings should be amended before the evidence is closed, but in no case will the court ever find a decree upon the finding of a fact which he cannot see was understood by all parties to be a fact in issue or was admitted. Certainly, it would be most unjust to permit a plaintiff, after the testimony has been closed, without a hint of such a claim, to work out from the evidence entirely different therein from those stated in the complaint as the ground of liability on the part of the defendants. Especially would that course be in a case of this character, where the mass of testimony is so great, and was admitted upon so many issues which were made in the pleadings.

Plaintiff's counsel claimed that evidence of other facts is admissible if they tend to establish the plaintiff's right to recover in its general scope and meaning. Of course, if other facts tend to prove the allegations, they are admissible.

Otherwise, I do not understand the contention, unless it be meant that evidence will be received if it tends to prove any fraud in the impeached transaction. This would entirely do away with the rule, now well established, that the plaintiff must state the specific facts upon which it relies; must point out the acts which he claims are fraudulent, the duty which has been violated and the particular breach of it.

Nay, he may in his complaint state facts which he knows cannot be proven, and upon the trial may rely upon a totally different case.

The fact that as a rule of evidence the burden of proving fair dealing is on the defendant does not affect the rule of pleading.

It rather increases the necessity of having the breach of duty upon which the plaintiff relies specifically pointed out. Perhaps the ingenuity of counsel may now discover in this record many facts which it was material for plaintiff to know, and which it was not proven she did know. It would be hard measure for a defendant to be required, on the argument, for the first time to show that he disclosed facts concerning which at the trial there was no alleged dereliction and no hint of materiality or ignorance.

There never was a case, there could hardly arise one, where the rule would work more harshly than in this very case.

Take for instance, the matter of the dividend of the Western Development Company.

The complaint charges defendant with falsely representing the corporation as insolvent, that a certain stock and bond dividend had been improperly declared, and would be revoked to enable the company to pay its debts; that defendants would return their dividends, and plaintiff would be required to do so.

The answer avers that the dividend was improperly declared, there being no surplus on hand to divide; that finding it had been done by Colton, defendants insisted that the resolution should be revoked, but finally consented that it might stand, under promise of each to the others that in case any or all of the bonds should be required by the company, they would return them. I have been unable to find, after considerable search in this immense record, that anything was said by counsel or witness which would indicate that plaintiff claimed that this agreement would show the existence of fiduciary relations, much less that any claim to relief was based upon a failure to communicate the fact of this agreement to plaintiff. I am convinced that during this long, wearisome trial, no word was uttered by way of complaint that either Wilson or plaintiff were ignorant of it. Plaintiff, when on the stand, was asked a great many questions which, with the answers, fill many printed pages, whether she knew this thing or the other before she signed the contract.

Naturally, counsel would expect to find here what she claimed to be fraudulent concealments, especially if there were any such matters not in her complaint. I do not find this matter there alluded to.

It seems plain that, until the evidence was closed, defendant's attorneys did not suspect, and had no reason to suspect, that any importance was attached to the question as to whether this fact had been disclosed.

On the argument, however, plaintiff's counsel insist and urge with great force that the failure to communicate this fact was such a breach of duty as of itself should compel the court to decree for plaintiff.

The case is all the worse from the fact that no one could read the evidence, understanding that there was no issue upon this point, and not be satisfied that both Wilson and the plaintiff knew all about it. While, if read with the idea that the matter was in issue, the proof might be insufficient to establish the fact. Certainly, on this issue the defendants have had no day in court.

But it is said that the fact is averred in the answer. But the answer contains no statement as to whether plaintiff settled in ignorance of the fact; nor is there anything there to suggest an issue upon that question.

The matter of the unpaid subscriptions, so far as concealment is concerned, is in the same condition, but I think that evidence admissible on another ground, of which I will presently speak.

As already suggested, there never was, to my knowledge, a case in which justice required the rules of pleading to be more strictly enforced. In few cases, if in any, have there been so many issues of fact, or has there been so much testimony. The door was opened very wide for the admission of evidence.

Plaintiff was allowed to show a partnership or other fiduciary relation from the manner of doing business. In this way nearly all the important transactions of the defendants, and of the corporations which they controlled, became proper subjects of investigation.

How few and simple, comparatively, were the issues on the cases cited here by plaintiff as authority for the court, to disregard the pleadings and to enter the judgment, which the evidence may warrant, upon any possible theory of facts which the ingenuity of counsel may devise.

In Place v. Minster, 65 N. Y., there was a variance as to the details of the conspiracy. It turned out that a sale was made to one Sherlock, who was to convey to defendants, instead of to L. Minster, as alleged. It was not really a variance, even as to the conspiracy, but only as to the details of the plan of carrying it out. It made no difference whether the person selected to pose as an innocent purchaser, was one or the other.

It was such an inaccuracy as could not mislead. The facts were few, comparatively. Such was the case in the other authorities. The court would easily see whether the parties had really tried the issues upon which the judgment was finally based. Here the evidence was admitted as relevant to other issues. The court cannot say that defendants would have had no further proofs had they apprehended the full extent of plaintiff's claims.

I think evidence was admissible as to what are called the omitted assets of the Western Development Company, as the pleadings stand. It is charged that defendants represented that company to be insolvent and unable to pay its debts, without a return of the dividends. This is averred to be a misrepresentation. The evidence was clearly relevant. This is a distinct issue from the charge of concealment, and from the charge that exhibit E was presented as a perfect inventory and appraisement of all the assets of that company, and that plaintiff thereupon compromised, supposing that she knew what property she was selling. Treated as a concealment or a misrepresentation as to what the assets consisted of, it was incumbent upon the plaintiff to specify. But the question of solvency was a different issue, and moreover was, in my opinion, one of the very important questions of fact in the case. The fact that this evidence was properly admitted for other purposes, cannot, however, enlarge the scope of the averments in the complaint, and the proofs must be considered solely in reference to the issues there made and tendered.

After stating facts calculated to show the relation of the parties and the character of the business in which they were engaged, the complaint proceeds to charge various misrepresentations made to deceive and defraud the plaintiff.

First—Colton was indebted to the Rocky Mountain Coal & Iron Company in the sum of one hundred and eighty-one thousand eight hundred and two dollars and ninety-nine cents, for money fraudulently appropriated and embezzled.

Second—He was indebted to the Western Development Company in the sum of twenty-six thousand six hundred and eighty-six dollars and twelve cents, for money fraudulently appropriated.

Third—That the Western Development Company was insolvent and unable to pay its debts.

Fourth—That Colton had caused the Western Development Company to improperly declare a stock and bond dividend without the knowledge of defendants, and that it was necessary to recall this dividend to pay the debts of the corporation, and that the defendants would return theirs.

Fifth—That four hundred and eight shares of the stock of the R. M. C. & I. Company in her possessien did not belong to the estate of Colton, but were held in trust by defendants and Mark Hopkins' estate, and upon their paying the cost price they were entitled to an assignment of such stock.

Sixth—That the value of the stock and bonds received by her from her husband's estate and the stock pledged to pay Colton's note for one million dollars was insufficient to pay Colton's indebtedness to the R. M. C. & I. Company, and his share of the indebtedness of the W. D. Company, and to themselves and the estate of Mark Hopkins.

Seventh—That Colton had commenced robbing them from the first day he was connected with them.

Eighth—They presented exhibit D, as marked in the complaint, as a true statement of Colton's liability to the corporation named for such misappropriations.

Ninth—They presented a statement, marked in the complaint as exhibit E, as a true statement and account of the assets and liabilities of the Western Development Company.

Tenth—That the values set opposite to the various properties or assets in exhibit E were the true values of each item of such assets respectively; and

Eleventh—That it was necessary to, and they did intend to, and would forthwith cause to be levied upon the capital stock of the Western Development Company an assessment of many millions of dollars.

Then followed allegations of threats, to wit:

That they would attack the reputation of her husband and blast his memory unless she complied with their demands and gave up certain bonds and stock and paid certain alleged indebtedness; that they would stop all future interest on the bonds, and would prevent their sale by her and take forcible possession of them; that they would take her home from her and all she possessed by legal process, in satisfaction of the indebtedness, unless she assigned all the stock and bonds received from her husband's estate to them.

Of course, the necessary allegations as to her ignorance of the real facts and her reliance upon the representations follow; but these matters constitute the gravamen of the complaint and all the specific charges made, unless, inferentially, others are made in the recitals of facts alleged to have been discovered by her since she executed the impeached agreement. She avers that she has discovered since the agreement that by it they obtained great and unconscionable advantage over her, and the said agreement was unjust and unfair; that

she had discovered the following facts, of which she was ignorant at the time she signed the contract:

First—That the million-dollar note was entitled to a credit of two hundred and fifty thousand dollars, and that all interest on the same had been paid.

Second—That the Western Development Company had divided twenty-one millions or thereabouts in dividends, and had on hand at the time of Colton's death property worth twenty millions, subject to an indebtedness of eleven millions three hundred and sixteen thousand four hundred and ninety-seven dollars and twenty-two cents.

Third—That immediately after the death of Colton the Pacific Improvement Company was formed by the defendants for the express purpose of superseding the Western Development Company, and which, since the assignment to it of the contracts, etc., of that company, has earned twenty millions of dollars, or thereabouts, from the business diverted from the Western Development Company by the defendants. By these acts the defendants sought to deprive the partnership of such earnings and to depreciate the assets of the corporation, and so to embarrass the plaintiff and defraud her.

Fourth—That the Western Development Company was never insolvent, but had always been prosperous.

Fifth—That her stocks and bonds were of greater value than defendants had represented and that defendants had always known their representations to be false. They had been appraised much higher in the Hopkins estate, in which appraisal the defendants had been consulted. This inventory had been retained by the defendants, and she was not allowed to consult it.

Sixth—That Colton did not hold the four hundred and eight shares of R. M. C. & I. Co.'s stock in trust for the defendants and Mark Hopkins, but that stock belonged wholly to Colton and was worth forty thousand and eight hundred dollars.

Seventh—That Colton was not indebted at all to the R. M. C. & I. Co. or to the W. D. Co., as defendants had charged, and had not appropriated any money from either corporation, and such were created after Colton's death to coerce her into executing the contract.

Eighth—The exhibits of the condition of the Western Development Company were false and untrue and the property undervalued by the direction of the defendants to deceive the plaintiff as to the true condition of her husband's affairs. These alleged misrepresentations, threats and discoveries contain all the charges against the defendants, and upon such of these as appear to be established she must recover, if at all.

Appended to the complaint are exhibits D and E. D contains a list of the misappropriations or indebtedness charged against Colton in favor of the Rocky Mountain Coal and Iron Company and the Western Development Company. E is a list of the assets of the Western Development Company, with the values appended to each item.

Limiting our inquiries to the issues made in the pleadings, or at least to such as both understood, or ought to have understood, to be at

issue, the inquiry which naturally suggests itself first is: What relation did the parties to the assailed contract bear to each other at the time it was executed? Were the individual defendants the trustees of the plaintiff, and were they charged with certain duties to her in those transactions which prevented their dealing as strangers, and the non-performance of which would render the contract void at her option? It seems to me quite obvious, to begin with, that the relations between Colton and his associates in regard to the various enterprises inaugurated and carried on by them in pursuance, necessarily, of agreed plans, and for definite purposes, were to some extent fiduciary.

A business association can hardly be imagined, the purpose and character of which and the modes of carrying on which implied and necessitated a greater degree of actual confidence than that which existed between Colton and the individual defendants. Certainly exhibit A does not state fully the purpose of the contract then made, nor the character of the services the parties to it were expected to render. They agreed with each other that they would all serve certain corporations, but they did much more, and much more must have been definitely understood by the parties when they executed that contract. Why should they contract with each other that all should serve certain corporations? How could they become employees, unless the corporations would employ them, or how could these individuals contract for the corporations as to the salaries to be paid? Evidently they had agreed to co-operate with each other in acquiring the control of the corporations, and they agreed to co-operate afterwards in their management. This implied accord, consultation, agreement in an object to be accomplished, working with and for each other. There was, to some extent, mutual employment, mutual agency. Perhaps there was no very definite plan agreed upon in all its details; but there was evidently a system of roads for the Pacific Coast and such transcontinental lines as they might be able to control. In detail they must have been indefinite, subject to frequent change and adjustment as all should agree from time to time.

At first, of course, the Central Pacific and the Southern Pacific were matters of chief interest, and, perhaps, have continued to be; still, they are but part of a system of roads which they have contemplated and have built and constructed. Their projects have probably grown with their enterprises and been frequently changed. Necessarily they have been in constant consultation, and as each new scheme was determined upon, each seemed to have had his part in the work, though apparently as each party then decided for himself whether he would go into it. There seems to have been no power in the majority to commit any one to a project until he approved it. The rule was as laid down in one of the letters, "in what we do we should all agree." They, therefore, must have had at the time the contract was signed on October 5, 1874, some general idea of the enterprise they were embarking in, and each did embark in

the enterprise in the belief of the willingness of the others, and in confidence of the integrity and fidelity of each. The advantage gained or sought was co-operation, and the essence of the contract and of the relation was confidence and reliance upon each other. Thus filling the very definition of a trust, they formally agreed to give their services to certain corporations, but they evidently meant that they should assist each other in controlling and managing the corporations in such a manner as would make the corporations serve themselves. But they evidently had plans beyond the scope of any existing corporations, and when they agreed to serve certain corporations, named and unnamed, they also intended to create such new corporations (as in the course of events) they should find necessary or deem advisable to the realization of the larger scheme which transcended all the corporations. The contract really meant that all should assist in these designs. As directors or employees of the corporations named in exhibit A, they could not organize other corporations.

The Western Development Company owned all the stock in various other corporations, but none of these other corporations were or could have been organized through its corporate action, or by its stockholders acting as such. The parties, therefore, evidently intended to secure the co-operation of all in matters entirely beyond the province of any corporation. They agreed in effect to consult and conjointly to organize new corporations and to inaugurate new enterprises as they should all agree. It is not of consequence whether such an agreement could have been enforced. They voluntarily acted upon it, and we are now concerned with the consequent relations. In the management of the completed roads also, it was evidently intended that the services rendered the particular corporation should be different from those of a mere employee of that corporation.

The branch roads were to be run as such, subordinate to the principal; and it will be seen, or may be, from this evidence, that leases were made and rentals fixed entirely in reference to other matters than the value of the use of the road to either of the parties to the lease. Thus one short road which only earns during the year the gross sum of about ten thousand dollars is leased to the Central for twenty-five thousand dollars, to enable it to pay interest on its bonded indebtedness. The character of the Western Development Company—the first corporation organized after Colton joined the defendants, and which was formed because of his accession, and took the place of the Contract and Finance Company—further illustrates the relation of these parties.

It was incorporated in December, 1874, for the declared purpose "of carrying on the construction, manufacturing, mining, mercantile, mechanical, banking and commercial business in all its branches, receiving deposits of money and loaning the same; purchasing, owning and holding real property, improving and selling the same; the construction, leasing and operating all kinds of pub-

lic and private improvements, such as railroads, wagon roads, bridges, ferries, wharves, shutes, piers, telegraph lines, canals, ditches for drainage, agricultural, mining, navigation or other purposes; buying and selling and constructing all kinds of public and private dwellings; buying and selling and dealing in all kinds of public and private stocks, bonds and securities."

The range of powers in this corporation seems to have been made as large as possible, that it might become, as near as a corporate body could, the universal factor of the parties associated by the agreement of October, A. D. 1874. It does not represent by any means all that that association evidently intended, but it shows the great variety of enterprises they then thought it possible they might engage in, and that corporation, in enterprises or speculations, was the one distinctly understood purpose of that association.

But, as it is claimed that this corporation was itself a partnership, masquerading under a corporate mask, or if not a partnership, it was of such a character as at least would, and did, of itself, constitute the stockholders trustees for each other, we will examine it a little more closely. It was a close corporation, having fifty thousand shares of stock of the nominal value of one hundred dollars each. No assessment was ever made on the stock, nor was any contemplated as probable. The capital required was agreed to be furnished by the associates, in proportion to their stock, by deposits made with the company.

Each party seemed to have the power to withdraw the deposits to some extent, as his necessities would require, and it evidently was not expected that deposits should be kept equal, for interest was allowed by the company upon deposits for the purpose of compensating any inequality which might exist in the amounts. Nevertheless, it certainly must have been intended, and the parties must certainly have understood, that each was under some obligation to contribute about his share. It was probably expected that they would not be very exacting, but yet there could hardly have been an agreement that any one could be at liberty to contribute nothing, or very little, while the others were giving all. They needed money. It seems always to have been the important question with them: How could they get enough for their necessities? And I find nothing in the evidence or in the circumstances of the parties to warrant the inference of an agreement, express or implied, that in no event would there ever be an assessment. Had either one failed to contribute, I see nothing to have prevented the others from enforcing the contribution by a call.

Ten thousand shares were issued to each of the other parties, but none to Colton, but the other ten thousand shares were issued to one of the nominal corporators, an employee of the company, by him endorsed in blank and left with the secretary. Colton, however, entered at once into the employment of the company, became, in fact, its chief manager, and acted in all respects as though it was one of the corporations in which all were interested and contemplated by the contract in exhibit A.

In October, 1876, in pursuance of a provision in the original contract of October, 1874, the others gave Colton notice of rescission of that contract. The consequence seems to have been, not that Colton then withdrew from the railroad business, but that soon after he paid near fifty thousand dollars to S. H. H. & C. for an interest in the Western Development company; that five thousand five hundred and fifty-five and five-ninths shares of the ten thousand shares practically then unissued were issued to him and the remainder to S. H. H. & C.; that Colton deposited over three hundred thousand dollars with the company, and the contract, exhibit A, was executed and dated back to October, 1874, to take the place of the original contract, which had contained the power to the other parties to rescind. This transaction made Colton the owner of one-ninth of the stock of the W. D. Company, while each of the other parties had two-ninths.

It is, perhaps, of no great consequence in this case, but one can hardly resist the impression that it was at first intended that Colton should have an equal share with the others, but that he was not able to contribute his proportion, and that the notice to rescind was given in consequence of this failure, and the final arrangement was the compromise made.

At all events, the corporation continued to be, as it had been, the almost universal agent of the associates in the accomplishment of the schemes which I think were contemplated when the parties first contracted for the co-operation of each other in the contract, exhibit A.

They have built many railroads, steam vessels, fences and bridges, repaired wharves, docks and steamboats—in fact, have done everything in the way of construction, repairing or furnishing that their extensive business has required.

It has had surveys made where it was constructing no roads. It has, in fact, furthered the designs of the associates before they had found expression in any corporate organization or any contract with the company.

The new companies were frequently, or at least sometimes, formed by the employees of the W. D. Co., posing as corporators, and then as directors.

The new company then contracting with its virtual creator to build and furnish its road for all its stock and a certain amount of bonds per mile, the working capital was furnished by deposits made by the corporators as before mentioned. These constituted the working capital, but always appeared on the books of the company as indebtedness due the depositors.

Thus, when exhibit E was made out it showed an indebtedness as follows:

To estate Mark Hopkins	$4,087,692 10
To Charles Crocker	2,219,541 79
To Leland Stanford	1,763,734 85
To C. P. Huntington	3,519,701 42
To estate Colton	319,860 33
To S. H. H. & C	298,208 35

But while the Western Development Company seems to have been gotten up to carry out and realize the projects for which the parties associated themselves by exhibit A, and while it was managed almost like a partnership, to accomplish their common purposes and to serve their personal ends, it nevertheless was a corporation and transacted its business as a corporation, going through with all the corporate forms. The officers were the mere employees of the associates (a term which I use for convenience, meaning only the parties to contract—exhibit A), and implicitly obeyed the directions of either one of them. But such directions were generally, where necessary, reduced to the form of corporate resolutions.

The contracts under which they have performed such an amount of labor and secured so many millions of assets were with their own creatures, or, at least, with corporations practically belonging to the associates. The contracts were of course all voidable, at the option of either party to them, only neither party had voice or volition against the associates. It may be said that in effect these associates organized corporations and built railways, taking, as they had a right to do, all the stock and such amount of bonds as they saw fit to encumber their property with. Perhaps, in a proper case—that is, where it was necessary to do justice—the court would disregard these corporate forms and, reaching beyond them, grasp the substance.

If it were necessary to enforce some contract in relation to these matters made between themselves, perhaps the court would do so. But often, perhaps generally, forms are made to secure rights. Are these corporations here mere forms, or do they and were they intended to constitute and show the relations of these parties to each other? The law of the state authorizes corporations for any purpose for which men may lawfully associate themselves. There is then no business which it is possible for a copartnership to conduct which may not be carried on by a corporation. I see no reason why, when persons have determined to embark in any kind of business together, they may not determine for themselves whether they will do so as partners or as stockholders in a corporation. And if they have so chosen, I do not comprehend how the court can disregard the relation they have contracted and force upon them those they have declined to enter into. The case cited falls far short of the exigencies of the plaintiff's case in this respect. In both of the cases cited from this state there was an antecedent agreement, to carry out which in part the corporation was formed. The parties to the agreement were the only stockholders; some one of the contracting parties attempted to avoid liability or defeat the contract on the ground that this corporation they have created as an instrument to carry into effect this very agreement is now a third party and not bound by the agreement as not a party to it.

The court, in effect, said justice shall not be defeated by this merely formal thing. It really only represents yourselves. We will look behind the form to the substance. The contract shall not

be defeated by this mere technicality. The case of Short v. Baudry hardly amounted to this. There the corporation was, and was created only to act as a naked trustee of the legal title, the beneficial interest being all the time in the partnership, and it would seem that whole matter might have been settled without the comments made. Here there is no question of an antecedent contract, with the enforcement of which the corporate entity stands in the way. It is not an obstruction which can embarrass the court in granting relief, which, but for such technicality, the party would be entitled to. They are to be made to vanish from sight to show what the rights of the parties are, or rather to fix upon the defendants obligations which they deliberately decline to assume, and not because they stand in the way or obstruct the court in ascertaining and securing the rights of the parties. All the parties were evidently unwilling to assume towards each other the relation of partners. The law offered them the choice to become stockholders in a corporation, and they deliberately contracted that relation. The same business could have been carried on in either form, and, if the corporation were a close corporation, in pretty much the same manner, except as to the authority of the managers; but this makes all the difference in the world as to the relation of the parties.

But one position of the plaintiff is, admitting that these are all corporations and are to be treated as such, still they are but the instrumentalities of a copartnership, which was created by the association of Colton with the defendants and Mark Hopkins. The individuals were partners, and, in consequence of the corporate agencies used by them, they had no firm name or partnership, capital designated as such, and the individual interests of the partners were measured by the stock held by each in their respective corporations, and the profits of the partnership were paid by way of dividends on the shares of stock in the various corporations held by each respectively. I see no mention of business in the complaint carried on by these parties except corporate business. Regarding these companies as corporate entities, it is difficult to see how there can be any other relation between the parties, so far as the business of each corporation is concerned, than that of co-stockholders.

I am not now saying that, taking the entire group of companies together, there may not have been here some sort of fiduciary relation; but am speaking now of the definite relation of co-partnership to carry on business. The complaint answers that of common carriers; but this we find entirely in these corporate instrumentalities which entirely manage them, and are fully adequate to the occasion, without the partnership. What is the business beyond the scope of the business of the corporations in which they become mere instrumentalities? Bring us the books of this larger business and show us its profits. What is there earned which is not corporate property? By averment, all the profits are corporate profits, and are divided among the stockholders as the profits of other corporations are divided.

I can understand how a corporation may be made an instrumentality of a partnership. These railroad companies are used as instrumentalities by many partnerships. But I cannot comprehend a partnership which has no firm name, no capital stock, no business, and earns no profits and incurs no loss. Take the case of loss. How can there be a partnership loss? Their profits are as stockholders, and their losses would be of the same character. What liabilities do they incur except as stockholders? The fact that they have sometimes borrowed money on their individual notes for the corporation would not affect this question. Any stockholder may do that. And will it be contended that if the majority holders of stock consult as to the policy of the corporation and agree together to enforce such policy, that they thereby became partners. I can see no reason why the averments of the complaint, as to the mode of conducting this alleged copartnership and the divisions of profits, would not fit any case where there is such consultation as well as this. It seems to me this is a misuse of the term instrumentality. The proper object of such corporation is to make money for its stockholders, through corporate business, as other corporations do. To say that the associates use these corporations only for that that purpose is to say that they are acting only as stockholders. A corporation must be made to serve some other business to constitute it an instrumentality in the sense in which the word is used in the complaint. I have not the faculty to grasp the idea of a partnership whose business consists in controlling a number of corporations for the purpose simply of enabling the corporations to make money for their stockholders in the legitimate business for which they were respectively incorporated. Fiduciary relations may exist between stockholders of various corporations who have associated themselves to control such corporations and make them work in harmony; but they would not be partners.

And so I conclude, although the corporations managed by these associates cannot be regarded as partnerships, nor as mere instrumentalities of a partnership between such associates, the relation between the parties has nevertheless been of a fiduciary character. I think it already appears that the parties to the agreement, exhibit A, intended something more than to procure situations for each other's employees in various corporations. They had designs not stated in that paper, which were the real purposes of the association. The fiduciary relation must have existed under our code as to these projected enterprises and the management of the system of roads they had built and acquired. The facts at once suggest to our minds the obligations of fidelity due from each to the common enterprise. Neither would have been at liberty to do anything to defeat the objects of the association. Each had invested his money and expended his labor in reliance upon the fidelity of the others.

But if a trust relation of this character existed between these associates, what was the relation of the survivors upon the death of Colton to his representative? At his death the association was en-

tirely ended. It was a case where confidence was given for confidence, service for service. There was no property belonging to the associates as such. No power over the affairs of Mrs. Colton or the estate of D. D. Colton survived his death. His position was one of great power over many things through this mutual confidence. She was merely a stockholder in various corporations. It is true, they continued to be virtual directors of these corporations, as they and Colton had previously been. But this no longer depended upon any confidential relations with the holders of Colton's stock. There was nothing to prevent Mrs. Colton from engaging in competing business or bind her to their schemes in any other way than any stockholder would be bound by the action of the directors. In other words, they had no other power over her affairs than as directors. The previous relations with Colton did not affect the question. They and Colton had no vested interest in any new projects not yet begun. The association was for the purpose of enriching themselves through the corporations. Whatever they had was held as stockholders. The mere schemes she had no lot in. The association had no property. They had further projects, schemes and designs. There was no succession as to those. The survivors, as virtual directors, owed duties to the corporations. The value of the stock and bonds belonging to some of those corporations and to Mrs. Colton individually depended largely upon the completion of some of these schemes, or at least their partial completion. She could not be called upon to contribute to any of these; nor do I see how she could require them to incur risks and expend their means and energies to that end. At least beyond the performance of contracts which had become obligatory upon some of the corporations they controlled. They were parties to a contract, the sole purpose of which was to secure the united efforts of all in the interest of sundry corporations in which they all had stock. One of them died. Evidently there is no consideration for the further service of the survivors, and no obligations except such as rest on all directors. Otherwise, it would seem that Colton's estate would be bound for further schemes to advance the system they had partly completed. This Mrs. Colton did distinctly decline to contribute to.

There was not then, after Colton's death, any further active duties as trustee due from defendant to the estate of Colton. They had, however, been associated with him in many important enterprises in which they had practically acquired much valuable property. In this way they may have acquired knowledge as to the value of the property, and they, in fact, had great power over the assets of the estate as virtual directors of these numerous corporations. The association between themselves was kept up, by means of which they continued to direct the policy of all the roads as they and Colton had previously done. Considering these facts and that the fiduciary relation, such as it was, between the defendants and Colton, had but just been terminated by his death, we approached the question as to what duties the defendants were burdened with in their dealings

with the plaintiff, and how they discharged them. It must be remembered here, that it is not claimed that the transaction was had under the influence of any trust relation. The plaintiff did not rely upon the defendants, believing that they were her trustees, and as such, owed her any duties whatever.

She understood that she was dealing with them as strangers, and that she must protect herself. It is claimed that the assailed contract must be set aside because she dealt in ignorance of her rights as beneficiary of a trust. Her counsel says this voluminous record contains no evidence that she was aware of this fact, or that the defendants ever dreamed that they had no right, legal or moral, to deal with her at arm's length, and as adversaries, and he claims that the concealment from her of the facts constituting the trust relation is one of the most pregnant facts in the case. And beyond all this, Mrs. Colton, as a witness, states that she did not deal or settle with perfect trust and confidence. That, at the time, she saw no justice in the transaction. That her heart rebelled. That she believes the defendants made the charges, knowing them to be false. That they manipulated their books to sustain the charges, and were altogether unworthy of any trust or confidence, and, in effect, she said that she believed that the settlement was a robbery, which, under the circumstances, she was powerless to prevent. Of course, this at once takes out of the case all claim that the settlement was brought about by any personal confidence in the defendants. She did not rely upon them.

If this was an issue in the case and there was a presumption against the defendants and the presumption was a disputable one, it could not be more completely disproved. If the relation between the associates be denominated a partnership, or be considered such, it would not change this result. At Colton's death the relation was dissolved, and there survived to the defendants no power as partners, because there was left in their hands no assets of the firm to be administered. It is, therefore, for the purpose of this case, utterly immaterial whether it be denominated partnership or not.

The conclusion to be arrived at, and as to the obligations which rested upon the defendants as late partners or trustees of Colton, may depend much upon the construction given to the provisions of the code in relation to trusts. I understand that the death of a partner dissolves the relations, except for the purposes of liquidation and settlements. Perhaps this might involve in some cases performance of incomplete contracts. Now, there never was a time when the death of any one of the partners, if they were partners, would have left to the survivors property of the partnership or power over the estate of the deceased partner such as goes to a surviving partner. This would go far in my opinion to show that the relation was not that of partners, but independently of that this fact must affect very considerably the relation of the survivors. The surviving partners are trustees with reference to the interest of the deceased in the firm, because the property is left in their hands, and a power

with reference to it survives to them. They have the property and the power, and hence the duties and the correlative rights of the *cestui que trust*. There being here no property or power as survivors, the relation and duties, it would seem, would also cease; all, anyway, except such as frequently survive the actual relation—the duty of making full disclosure, and to refrain from taking any advantage of the position to oppress or influence the beneficiary of the late trust.

Plaintiff's counsel, or some of them, contend that the code has made quite a material change in the law of trusts, or at least in the application of the rules heretofore recognized and enforced by courts of equity upon the subject. As I understand, it is contended that whenever circumstances exist which, under our code, would constitute what is there designated the trust relation, the law fixes upon the trustee a definite set of duties, which are the same upon all trustees or all who, by the code, are declared to be trustees, however various the obligations may be which the parties have knowingly undertaken, or the character or degree of confidence by which the reduction was created. If there is any foundation for this claim it is a very important question; for it is also contended that all who accept any degree of confidence from another are trustees within the meaning of the code. That all those who were simply called trustees in the decisions by analogy, and became to some extent the law, if the trust relation was applied to them, are by our code placed upon the same footing as technical trustees. This will include innumerable cases in which transactions were had partly in consequence of known reliance of one party upon the other, or upon some statement made in the negotiations. Counsel has cited one instance of the creation of the relation by actual reliance of one party upon the other.

A country dealer goes to a wholesale merchant to purchase goods, and, being asked in regard to his solvency, undertakes to state his financial condition, and at once the wholesale merchant becomes his *cestui que trust*, and, although counsel does not expressly claim this, it would follow from his position that if now the retail merchant purchase, he trades under all the obstructions which are placed upon the dealing of technical trustees with their beneficiaries. He must protect the confiding wholesale dealer from selling too cheap, and if he does not himself know, must be diligent to find out, that he may inform his beneficiary of all matter material to the transaction. He must do more; he must disclose his real motives in seeking to trade, and this includes his future policy in reference to the goods, and if it turns out that he had, or thought he had, some special opportunities of disposing of some of the goods which he did not disclose, the wholesale merchant may, at his option, rescind the sale or claim an accounting of the profits made, and then the retail merchant is presumed, without proof, to have obtained the goods for an insufficient consideration and by the use of undue influence.

The code, it is said, defines a trust as a relation, and declares that the relation exists whenever one voluntarily assumes a relation of personal confidence with another. The code then defines the obligations of trustees, which it is contended apply in their full length and breadth, and therefore, of course, to all cases alike, to every case in which there is a reposition of confidence of any character or degree. The extent of the supposed charge in the application of the law will be better appreciated in the remarks of the late Professor Pomeroy upon the code provisions in regard to trusts. He says:

"The essential conception of a trust, as a word of legal nomenclature, and as defined by the text writers of the highest authority, assumes not only a confidential relation between two persons, but also some specific thing—land, chattel, money—as the subject matter of such relations and to co-existing estates in the same subject matter; the one legal—held by the trustees, the other equitable—held by the beneficiary. All the constructive rules of law and of equity concerning trusts are based upon these essential elements of the peculiar legal conception—namely, the confidential relation, the subject matter and two co-existing estates therein.

"It is true the term has often been improperly extended by analogy or metaphor to cases where there was only the confidential relation and a subject matter without the two co-existing estates, but it has never been so extended to cases where there was only a confidential relation between two persons. The ablest modern judges—English and American—have endeavored to restrain all such expressions of the term by analogy and to restrict the use of the word to those cases where all of its essential elements were found.

"Nothing more tends to produce confusion and uncertainty in legal rules than the use of fundamental terms in improper senses. The authors of the civil code, in their definition of "trust," have totally ignored the essential elements of a subject matter over which the relation extends, and have made it depend alone upon the existence of a confidential relation between two persons." The learned professor then goes on to remark that if the definition be interpreted literally, and if the meaning thus given should be followed to its logical results, the whole grand department of equity relating to trusts must necessarily be modified, if not reconstructed. Indeed, he says, the liberal interpretations would make every one who wrongfully takes or converts a chattel a trustee; carried to its logical conclusion, this code, if their construction be correct, would leave very few transactions, indeed, unaffected with the trust relation. The least reliance in a negotiation of one party upon any statement or assurance of the other converts the one into a trustee and the other becomes his beneficiary. The practical effect would be that the obstruction to transactions created by the trust relation would be extended to all business affairs. Then the difficulties of accomplishing the very transaction which occasioned the confidence would be so great that to make an unassailable contract would be almost impossible. The reliance upon some representation being

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manifested, the relation is created *eo instante*, and the code has tabulated the duties and obligations of the trustee, which do not spring from the contract nor vary with the nature of the confidence. The best developed and cultivated moral sense would never suggest the duties which the trustee has assumed. They have no reference or correspondence to the nature or degree of confidence or to what both parties would, in the nature of things, expect. The only material circumstance is a reposition of confidence, no matter what or to what extent, so it be material to the transaction or to the relation of the parties to the subject matter, and in many cases where it is not material in either respect. It is unfortunate if our code has enacted this uniformity of duty and obligations in relations which vary as widely as human transactions can or as can be conceived of. It would be strange if such a law were found upon the statute book of any civilized community. Stranger still, perhaps, that counsel should commend such a standard of conduct as a high one, and protest against any lowering of such a standard. This would be to establish rules governing the ordinary affairs of life above the moral vision of the people. The enlightened conscience of at least the best and most cultivated should be able to discover the duty from the nature of the relation or transaction; otherwise, they become traps for the unwary and prolific seeds of unjust litigation. They would legalize bad faith and encourage a most shameful species of fraud. In this trial I have heard read case after case in which, while the transaction has been successfully impeached, the chancellor takes pains to say that the losing party has been guilty of no wrong. This has struck me as a reason to question the perfection of a jurisprudence where such results can be so common. Under this construction our statute would increase the evil a thousandfold.

One of the eminent counsel for plaintiff does not agree with this construction of the statutes, and I can do no better than to quote his language.

"To my mind these words do not in themselves convey precise notions of relative rights and obligations. The words trustee and *cestui que trust* are used with an indefinite variety of meaning and shades of distinction.

"They no more imply a definite group of duties on one hand and rights on the other, than the words principal and agent in themselves convey a precise notion of the agent's powers, or the principal's rights.

"When these are to be ascertained, in any given instance, it always remains to inquire how the agent was constituted—for what purpose, what powers were conferred upon him, what functions he assumed to perform. All these must be known, and accurately known, before it can be affirmed that, in a given case, there has been a breach of duty. The same is true of a trustee.

"As there are an infinite variety of trustees with duties equally various, the word trustee does not, in and of itself, convey any definite idea of given duties.

"Besides, the word is often employed in a figurative sense, or with metephorical adjectives which indicate the looseness of its usage.

"When, therefore, it is sought to determine the duties of a trustee in a given case, the greatest confusion is sure to rise if, after establishing that he is in some sense a trustee, search should be made in the digest, and the doctrine of every precedent arising between a trustee and a *cestui que trust* should be applied to the case in hand.

"To illustrate my meaning upon this point: A guardian is unquestionably the trustee of his ward.

"It is also said that a judgment debtor, whose property has been sold at judicial sale, from the day the period of redemption expires, until the execution of the sheriff's deed, is a trustee of the legal title for the purchaser. But would any one contend that the duties and obligations of each are the same? * * * *

"The law presumes that a purchase made by a legal guardian from his ward was obtained by the use of undue influence. Does that presumption prevail when the owner of property sold for taxes buys back from the purchaser the rights which he obtained from the sale?

"The fact that a guardian has not paid full value for the ward's property is absolutely fatal to the transaction. Does the owner who buys back the tax title run the risk of having his purchase set aside because he succeeds in rescuing his property at less than actual cost?"

It may be said here that the difficulty is more apparent than real; that, in the case of the purchase of the tax title, the vendor was evidently not dealing on the basis that he was getting full value for his property. He expected only a large profit on his investment. He will, therefore, be held to have waived disclosure and protection from the trustee. The same line of reasoning may be applied to the case of the wholesale and retail merchant, and in all such cases. The circumstances show that there was no actual reliance beyond the particular assurance, and beyond that they will be held to have waived the benefit of the relation. This suggestion has not been made in this case, and would, probably, be repudiated by all; but it seems to me that a literal interpretation of these provisions of the code carried to their logical end would necessitate such a presumption, or practically all business would be obstructed.

It would only be an awkward way of getting rid of the paralyzing rigidity of the code, which can but embarrass courts in the administration of justice.

One of the boasts of courts of equity was that these rules were in the highest degree flexible, and one chancellor is quoted as expressing the hope that they never would become so definite that they could not be freely varied to meet new exigencies as they should arise.

The effort was rather to discern and seize upon the reason of the rules, and to apply that to the circumstances of each case as it should present itself.

The general idea of a trust, as above stated, has reference to the relation of the parties where one holds the legal title to property for another. The rights of the *cestui* were merely personal against the trustee. Courts of law recognize the trustee as absolute owner; but since he acquired title by virture of the confidence of the trustor, that he would hold the property for the use of another, courts of equity will compel him to do what he has agreed to do, and will prevent him from doing that which he has in effect promised not to do. In many other cases besides these, in which the title to property is held in trust, persons acquire control of the property of another, or influence to control his conduct, or peculiar knowledge of his affairs, through confidence reposed in such persons, and voluntarily accepted. In such cases, and perhaps others where the circumstances are such that the courts of equity conclude that like rules ought to be enforced, they are regarded as trustees by analogy, because the same reasons exist as in the case of strict trustees for the enforcement of the like good faith. But they are regarded as trusts only so far as justice requires the applications of the like rules, and hence the great flexibility of the law and the great latitude allowed the chancellor in their application. In every trust which imposes actual duties upon the trustee, the trustee becomes to a certain extent the agent of the beneficiary. He has become so through confidence that he will, to the extent agreed, subordinate his interests to those of the *cestui*. To that extent he will give the beneficiary the benefit of his faculties, his knowledge and his position, but he is bound to this self-abnegation no further than he is agreed. Knowing what he has undertaken, we can determine what duties he owes his principal, and we determine them from the nature and purpose of the confidence precisely by the same process by which we determine the obligations of a contract. It is, in fact, a contract that the trustee will faithfully perform the confidence. The obligations of a trustee, defined by the courts and in the statute, are the duties he must perform in keeping this confidence. He must do all that was expected of him as a consideration of the confidence; he must abstain from every act inconsistent with that relation. He must not allow himself to be placed in a position where he cannot give the beneficiary the unbiased use of his faculties to further the object of the confidence; and he must not make a profit himself from the relation, to the possible injury of his *cestui*. Impliedly, he has agreed to do and abstain from these things to the extent to which he has agreed to substitute and serve another self in lieu of his own proper self.

And these are the rules of the code, limited always by the extent and character of the confidence to be applied where applicable, and no further.

The purposes for which trusts are created vary as widely as the purposes of contracts and the degree of confidence implied by actual relations vary as widely. How different the active duties and powers of a guardian or an attorney at law from those of a naked holder of

the legal title for another. There was no active duty but to convey upon request, but the others are bound to give to their beneficiary advice and counsel, and to be diligent to know that they may wisely advise. Any enlightened conscience would suggest to the one difficulties in the way of dealing with his beneficiary which no one unversed in the code would think of in the other relation. In one relation it would naturally suggest itself to the conscience of a just and reasonable man that he should not purchase from his beneficiary, until he had imparted full knowledge in regard to the property, and that he ought to be able to truly advise his client of every material thing in reference to the transaction. But what would suggest to the naked trustee, who never had control or management of the property or acquaintance with the beneficiary, that he owed his *cestui* in such a transaction counsel and advise against himself?

The law of trusts has been said to be the rule of the highest morality in business affairs. In such a code a good man's conscience ought to be a law unto himself. But no one, without a special guide, could follow these artificial ways.

The general rules in the code must be taken as general rules only and applicable only to those cases which come within the reason of them. When the reason of the rule ceases, so should the rule: Sec. 3,570, civil code.

Some remarks cited on the arguments, and attributed by counsel to Mr. Justice Bradley of the supreme court of the United States, seem quite felicitous on this subject. He is reported as saying of those code provisions: "But they should not be allowed to usurp the prerogatives of justice itself, seated in man's bosom, by giving to the letter of the code the inexorable fixity of a statute, and thus reducing the exposition of the law to a question of philology instead of a question of reason and justice. Used as a statement of principles and rules applicable to cases clearly within their scope, and not as a restraint upon the judge in references to cases which are not provided for, and which require a new application of the rules of right and justice governing analogous cases, codes may not only be admissible, but may be of great service in systematizing and perfecting the law. They should never be employed for the purpose of giving to the law a cast iron fixity of form, and thereby repressing progress and imposing a smothering and deleterious restraint upon society itself. In all probability great trouble and difficulty will yet be encountered by the courts in construing the codes in respect to this matter. The trouble is more serious because our codes contain not only a digest of the decisions, the *rationes decidendi* on points generally referred to the unwritten law in respect to which flexibility and elasticity is the crowning merit, but also proper statute law, the object and merit of which is certainty and rigidity, uniformity of rule. Some such rule as that laid down by Mr. Justice Bradley must control these provisions, however, or their application to actual cases must be explained, as I have before illustrated; otherwise the code would prove an unmixed evil. In

the text books these rules are laid down as broadly as in the code, and yet no one ever understood the rule to be the same in every case. Thus, in Perry on Trusts, after giving the law of the acknowledged fiduciary relations, he says:

"These rules apply to every kind of fiduciary relation. The *principle* is the same in all of them. But equity goes further than this. It not only watches over these defined relations of parties, but it scrutinizes the undefined relations of friendly habits of intercourse, personal reliance and confidential advice. It is well known that habits of kindness, confidence and trust grow between neighbors and friends, and if advantage is taken of such relations to obtain an unfair bargain, equity will set it aside or convert the offending party into a trustee. Of course, no rule can be laid down by which to judge all such cases; for every case must, of necessity, depend on its own facts. As I understand counsel, they contend that all these last named relations are by the code called trust relations, because there is the reposition and the acceptance of confidence, and dealings between such persons are obstructed to the full extent of difficulties to transactions between guardian and ward or executors and residuary legatees, or any of the clearest trust relations. On this principle the defendants are charged, or sought to be, with all the duties, obligations and disabilities which, it can be discerned, from the decided cases have ever been held applicable to any and all instances of trust by the courts. One distinguished counsel claims that personal confidence is conclusively presumed by the statute, and that defendants owed the duty of advice and protection as though they were special counsel or trustees to protect a spendthrift from his own improvidence, and, therefore, bound to advise as faithfully against themselves as in contracts with others. It is also claimed that a trust relation existed by reason of the pledge of stock to secure the million-dollar note. If my view of the law of trust, and the effect of the code, be correct, it is hardly necessary to pursue that subject further than to say that this fact—the pledge of the stock—as a matter of fact gave defendants no control and no opportunities to gain information of her affairs. Colton was continued in the active control by the terms of the contract, exhibit A.

The authorities seem practically agreed upon the proposition that there is no such relation of trust between the directors, even of a close corporation, and the stockholders, as will imperil the dealings between them as to the stock of the corporation. The directors are trustees as to the property of the corporation, and in respect to the property of the corporation are not trustees of the stockholders in regard to the stock. This view has been questioned by some law writers, and it is difficult to see, on principle, how they can escape the responsibilities of the fiduciary relation in their dealings with the stockholder who is not a director for his stock, which only represents his interest in the property of the corporation. At all events, it raises some presumption of knowledge on the part of the directors, and of control over the property of the stockholder in the corpora-

tion. It should be taken into consideration in determining the fairness of any transaction between them.

Here the relation of the defendants as virtual directors of the Western Development Company, was quite similar to the assignees of the late firm. The corporation has gone out of business. Practically, it only existed for purposes of liquidation. The case differed from that of surviving partners, in that the corporation must act as a unit, through the resolutions of its board, and was not bound because of the death of Colton to immediate liquidation and settlement. The individual directors, too, were not bound, as individuals, to liquidate and settle at all. Mrs. Colton could not have complained had they sold their stock in that company without realizing on its assets or settling the indebtedness. They were not her agents then, individually, to sell these assets, and to account for the proceeds. She, too, had the right, secured to her by law, to inspect the books. If this constituted the trust relation, therefore, it was, as all others, in fact, are, *sui generis*. We must determine the difficulty in dealing with plaintiff, from their active duties and powers.

These certainly did not, nor did any other suggested fiduciary relations, in my opinion, impose upon the defendants the duty of counseling or protecting the plaintiff as one to any extent their ward, in her dealings with the assets of the Western Development Company, or of any other corporation. In reference to the Rocky Mountain Coal and Iron Company, the defendants were in no sense at any time the trustees of Colton. Colton was their agent in its management, and, in that sense, their trustee.

If there was no duty to arise, there was no other obligation upon the defendants than that of a full disclosure of facts, within their knowledge as trustees, which were material for her to know in conducting the negotiations, and to deal fairly with her. This can be better considered, however, in connection with the circumstances of the negotiations and settlement.

I will now proceed to consider some of the most important issues of fact in the case; and first, in regard to the four hundred and eight shares of Rocky Mountain Coal and Iron Company's stock surrendered by Mrs. Colton. The complaint charges that the defendants falsely represented that this stock did not belong to Colton, but was held in trust by him for defendant and Mark Hopkins, and upon their paying the cost price they would be entitled to demand an assignment and transfer thereof. That she accordingly, believing this representation, upon receiving six thousand six hundred and twenty-eight dollars and ninety-two cents, which they represented to be the cost price, assigned the same to the defendants as part, of course, of the general compromise and sale shown by exhibit F. That she has discovered that this stock belonged wholly to Colton, and consequently to his estate, and was worth forty thousand eight hundred dollars. The answer practically admits the representation as to the ownership of the stock, but avers that the reason for the claim on their part was fully known to Wilson and Tevis, and also

the facts on which their claim was founded, and that no false representations whatever were made in relation to the matter.

It appears that defendants also claimed that Colton had received on this stock held by him in trust dividends amounting to about twenty thousand dollars, which amount was released to plaintiff as part consideration for the compromise.

Upon the question arising in connection with this issue, an immense mass of testimony has been taken, and there has been submitted statements from the stock books, accounts of dividends and numerous computations intended to prove or disprove the various positions assumed. These arrays of figures as arguments are calculated to bewilder one not more accustomed to such matters than myself; but after considerable study I have at least satisfied my own mind upon this question.

The only witness who gives direct and positive evidence in regard to an understanding in reference to the stock is Charles Crocker, and the issue seems narrowed down to the question whether the witness correctly stated the understanding or agreement under which the stock was purchased, or if he did, whether the understanding had not been modified or was not ignored by the parties afterwards.

Charles Crocker states that in 1870 he invited Colton, who then had no connection with the defendants, to visit the mine with him. They went, were pleased with the property, and Crocker purchased five thousand shares for himself and associates, Stanford, Huntington, Hopkins. On the way home, Colton asked permission to buy some of the stock. Crocker assented, and promised if he would buy one thousand shares to make him president and manager at a salary of one hundred dollars per month. To this Colton assented, and set to work at once to buy stock. He was now permitted to buy one thousand shares; subsequently, it was agreed that Colton should buy as much of the stock as he could on joint account of Crocker, Stanford, Huntington, Hopkins and himself. At that time he (Crocker) had five thousand for himself and his then associates, and Colton one thousand shares, giving each of them two hundred and fifty shares more than Colton. This disparity was to be maintained, each of the others having two hundred and fifty shares more than Colton.

Such testimony must always be taken with great caution. Memory is apt to be unfaithful in such things; subsequent impressions of transactions blend with original impressions. Colton may have understood that matter quite differently. Had they brought suit for the stock against Colton's representatives, this evidence would not have been received. During the years that had passed, Crocker had been burdened with important matters, and had confessedly paid no attention to Rocky Mountain Coal and Iron Company's affairs. They were intrusted, he says, entirely to Colton. Soon after the agreement to purchase the stock, Crocker sold out his interest in the mine, and in all the other corporations with which he and the other defendants had been connected, and started upon a

voyage around the world. He was absent two years, during which time he had no reason to trouble himself with the business of the coal company. In October, 1873, he repurchased his former interest, but in the following December again went on his travels in Europe, and did not return until August, 1874. Since that time and until Colton's death, according to his own testimony, he had paid no attention to the affairs of the coal company.

His memory would be remarkable if he retained under the circumstances an accurate recollection of the conversation in all particulars, and the facts do not substantiate his statement.

There was no time prior to his selling out and starting on his travels when Colton had one thousand shares. In fact, there never was a time when Colton had just one thousand shares and the others five thousand shares. Colton was made president and manager in January, 1871, although he had but three hundred shares, and he acquired no more until Crocker had sold out and started on his travels. The first step toward the purchase of stock which can now be discovered, was an assessment levied on the sixteenth day of August, A. D., 1871, which Wilson was informed was levied to aid their purchase of the stock. The first stock acquired after agreement to purchase on joint account was in September, 1871. They continued then to purchase, the stock being conveyed either to Colton or Stanford, until November 12, A. D. 1873, when a division was made by Colton and S. A. Hopkins, the latter acting for Stanford, Huntington, Hopkins and Crocker. This was an equal division of the whole amount of stock, including the five thousand shares purchased by Crocker, and is a practical interpretation of the contract to purchase by the parties. It was said this was the act of Colton, the others confiding in him. But the fact seems to be they did not confide wholly in Colton. They were represented by S. A. Hopkins. There was then no reason why they should have such implicit confidence in him. He was not then connected with the railroads. He was then simply a trusted employee. Hopkins would have not acted for them in so important a matter without first informing himself of their rights. Colton had no authority over him. And there is no apparent reason why he should have taken Colton's statements in a matter in which Colton's interest conflicted with those of his employers.

And then this equal division was allowed to stand for five years and down to Colton's death. During that time there had been seventy-eight dividends, by which they had divided more than one-half million of dollars. For sixty of these Crocker had personally receipted on the dividend book, for the dividends on his own shares; and on the same page on which he signed his name, was shown the amount of stock held by each stockholder. Most of the stock was held by the five, and generally there were only fourteen stockholders in all. Crocker often receipted for the dividends of the other three also. On each page where he gave these numerous receipts was

spread out before him the evidence that the disparity he claimed did not exist.

Stanford receipted personally under the same circumstances thirty-seven times, and Mark Hopkins, for his own dividends and Huntington's thirty-three times.

This corporation was also in effect a close corporation.

Crocker, of course, knew the total amount of stock in the corporation.

It was receiving almost its entire income from the Central Pacific, under an arrangement, which, perhaps, would not have been made only that they held the stock. The evidence shows that they considered themselves entitled to those profits, because they came from the contract with the Central.

It also appears they knew just who owned the stock. It all belonged to such persons as they permitted to hold it and to no others. All were their employees.

The dividends to such were undoubtedly understood to constitute extra compensation. This was expressly so with Colton, who was told that one hundred dollars per month was a sufficient salary, because the stock would pay a dividend right away from its contract with the Central.

Naturally, each would know what proportion of the whole stock he should hold. The dividends were monthly and generally were one dollar for each share of stock.

At each dividend each would be reminded of the number of shares he held. On the page where each signed the receipt was also displayed the numbers held by the others. There, on the same page, where each signed, it was shown, if the theory of the defendants be true, the evidence that Colton had more than his just proportion.

It is not to be believed, either, that Colton would have risked this, or the others overlooked it.

There were always some shares held by trustees, and it is suggested that Colton kept a portion concealed by being held by others.

It is evident, however, that the defendants and Colton assumed the right to say who might become owners; that none held stock without their permission. It is fair, therefore, to conclude that they knew who really owned the so-called outside stock. At all events, they must have known how much of this outside stock they had permitted, and, knowing his own holding, each knew, or had the data for knowing, whether he had as much as he ought to have had. They would not, in all probability, overlook so material a matter as a disparity of two hundred and fifty shares each.

The theory, then, of this unequal holding, is not admissible.

It is too plain that they have divided among themselves on a different basis, which they recognized too often and acquiesced in too long to be now set aside on this showing.

But that does not quite close out this question. After the division in 1873 Colton purchased three hundred shares more from the estate of Deuel, which he held undivided at the time of his death?

Was this acquisition also subject to the contract with Colton that he should buy on joint account?

At the time of the division the entire stock of the corporation had been purchased or was held by parties who were expressly permitted to retain the stock by defendants, and plaintiff contends that under such circumstances the division was a final settlement upon full performance of that contract; all having been acquired, there was nothing further to be done.

The stock which the five principal owners permitted others to retain is spoken of by witnesses and counsel as stock outside the arrangement between Crocker and Colton. Therefore, it is contended any one could buy up this stock and hold it as outside stock to which the associates had no claim. But certainly there is another side to this. The stock paid a very large profit upon the cost. This came from the Central. The defendants assumed all the time —and Colton assented to the claim—that they had a right to these profits, or to say who should share in the good thing. Only their employees were allowed this privilege. Deuel was an employee, but he died. Evidently it was not desired that stock in this practically close corporation should really get where they could not control it. It would then not be within the reason of the permit to hold outside, for it would no longer serve their interests to allow others to get the benefit of it, and they might be embarrassed by it.

But if it were doubtful whether this stock was purchased for joint account, the letters and acts of Colton seem to remove all doubt. At the time of the division Colton was negotiating for its purchase, and confessedly for others as well as for himself. The transaction, however, was not concluded until December 27, 1873. On the twenty-sixth of December, Colton wrote to Beeman, who was attending to the matter for him at Evanston, as follows:

"How are you getting along with the Colton stock matter with Frost? I hope he will close it up soon, as he agreed to, so I can get the matter off of my hands. I don't want six thousand dollars lying there idle. What does he say in justification of his conduct? I reported to parties that I had bought it, and part of the money belongs to them, and they begin to act as though there was something wrong on my part, as they can't get the stock and have sent the money. You and I know it is all right, but it places me in a bad position having told them I had bought and got their money."

It is suggested that this letter was evidently written to hasten the business, and that plainly some of its statements are untrue. Defendants do not claim to have furnished any of the money, and if they had, and were getting anxious about it, they would never have permitted Colton to retain the stock through any neglect to look after it. This view places Colton in a very unenviable light. Few people would justify such positive misstatements. In regard to the

money, it is like many other unexplained matters in the case. It is not very positively stated that any complaints had been made about the matter by his associates, and this may have been purely imaginary, but plainly this letter affords sufficient grounds in the matter which were before doubtful to turn the scale against Colton.

He had then three hundred shares, which he ought to have divided. He was, of course, entitled to retain one-fifth. This left in his hands two hundred and fifty shares, which defendants and Mark Hopkins were to demand upon paying the cost price. They represented to Mrs. Colton that they could claim four hundred and eight shares, and, on that representation, she assigned that number of shares to them. The difference is one hundred and sixty-eight shares, said to be worth par, or sixteen thousand dollars.

Was this a misrepresentation, and has the plaintiff been misled to her injury?

The misrepresentation, if any, consisted in Crocker's version of the agreement with Colton that there was to be a disparity in amount of stock held by each. Computing with this as a basis, Wilson found, or they found, and so represented, five hundred and ten shares still undivided. Deducting Colton's fifth, there were left four hundred and eight shares to which they had a right.

This was clearly a misrepresentation, whether intentional or not. It was not true as applied to the transaction, and was relied upon. It is said that Wilson knew all the facts and circumstances upon which they based their claim, and, therefore, was not misled, but might have formed his own opinion as to its validity. But a material circumstance was the statement of Crocker that the rights of the parties with reference to the stock, depended upon this alleged contract with Colton, under which he represented the stock was acquired. In effect, we find this statement was untrue. Certainly Wilson had a right to rely upon this representation, and he did rely upon it. Defendants, therefore, must be held responsible for it, even though Wilson may have had the data in his hand from which he might have discovered the improbability of the story.

I next propose to notice, very briefly, the charges against Colton in connection with his alleged indebtedness to the Rocky Mountain Coal and Iron Company. A very large portion of the time occupied by this long and tedious trial has been devoted to the matter, and there has been manifested the greatest amount of interest and feeling. I propose, because of the obvious unpleasantness of the subject, to say as little about the matter as possible and yet pass upon the issue raised.

It is claimed by the plaintiff that the defendants represented to her that Colton was indebted to the Rocky Mountain Coal and Iron Company in the sum of one hundred and eighty-one thousand eight hundred dollars and ninety-nine cents for moneys which Colton had fraudulently appropriated and embezzled, and that exhibit D is a correct copy of these alleged liabilities of a similar character to the Western Development Company for about twenty-six thousand dol-

lars. It is also averred that defendants threatened that unless their demands were complied with they would attack the reputation of Colton and would disclose such facts and bring such charges against his honesty and integrity as would blast his reputation and memory. This threat has reference to these charges of embezzlement. She avers that since the compromise she has discovered that Colton was not so indebted, and had not embezzled the said sum or any sum, and had not fraudulently or otherwise appropriated any money, and that the claim of defendants that he had was false and simulated and created for the purpose of coercing her into an unfair settlement. The plaintiff says that these alleged threats to publish charges against her husband, coupled with the fact that lack of time to answer or disprove them, was the real cause of her accepting the terms. Afflicted and stunned as she then was by her unexpected bereavement, she was ready to sacrifice anything to prevent this charge from being made public.

It is well to note, preliminarily, here, that this statement, exhibit D, except the alleged indebtedness to the W. D. Co., is made up entirely from the books of the R. M. C. & I. Co.

This company and these books had always been under the special supervision of Colton. One set of books was kept at the mine, in Wyoming Territory; another, and the principal ones, at Colton's office in San Francisco.

The bookkeeper, for the greater part of the time, at San Francisco, was his brother-in-law (brother of plaintiff), and for the remaining period his nephew.

He frequently had the books laid before him for his personal inspection.

He was president, manager and treasurer of the company.

None of the defendants had ever seen the books prior to Colton's death, and they knew very little of the affairs of the company. After Mr. Colton's death, the books were submitted to an expert, and the charges in exhibit D were the result.

The expert was Mr. Gunn, who was an officer and employee of one of the corporations controlled by the defendants. The examination was commenced in December, 1878. January 15th following, Mr. Wilson's attention was called to it by Mr. Crocker, who told him of the alleged irregularities; that they were trying to clear it up, and he hoped they would be explained.

They were looking into the facts. They were examining and investigating. Afterwards, the examination continued, and from time to time new items were shown to Wilson.

Wilson was a member of the constitutional convention, and as soon as it adjourned, which was March 3d, he set to work to examine these charges. The books and papers were at his disposal, and Mr. Gunn, under instructions from Crocker, assisted him, showing him all that he claimed to have discovered and his evidence in support of each charge. They had frequent interviews, which sometimes lasted all day long. They examined the books together, and as each

new discovery was made by Gunn, he informed Wilson, and it was investigated.

In this way exhibit D grew up under Wilson's eyes. It was impossible that any one could have been better informed than Wilson was as to the manner in which it was made up, and the foundation of the charges expressed in it. Wilson, in connection with the plaintiff, and some few friends who were occasionally consulted, thoroughly examined the private books and papers of Colton in regard to the same matter. He sought information from various other sources.

Unquestionably, the most thorough examination and investigation of these charges made prior to the settlement was that made by Wilson. He certainly was better informed in regard to the importance and gravity of these accusations than any person could have been, unless we suppose without evidence that the defendants had some knowledge which they have suppressed in regard to some of the expenditures claimed to have been made by Colton.

On the contrary, all the circumstances seem to indicate that the defendants knew very little about these matters. For a large portion of the time, during which these malversations are alleged to have occurred, Colton was not the trusted associate of the defendants, except in the management of the coal company. There is no more reason to suppose that he would be expected to use the funds of the company for purposes which could not be safely shown on the books than any other employee.

I am not going into the discussion of how much it would help the reputation of Colton to suppose that the otherwise unexplainable appropriations can be explained, by the suspicion that they were intended to be used improperly, influencing the officers of the United States land department, or in procuring testimony which it would not do to have known. Certainly, if any agent has taken money of his principal he could not defend it on a mere suspicion that he had expended it in bribing officers of the government or in subornation of witnesses in the interest of his employers. Since this suit was commenced, very thorough examinations have been made of the books by experts on both sides, and it is safe to say that information has been sought from all sources which there was the least reason to believe could afford any light. Some few items have been shown to have been incorrectly charged. So Wilson discovered, for he says his investigations generally, but not always, met with adverse result. These very complete and thorough examinations may have discovered, and probably have some explanations, as to a few matters, beyond what Wilson knew. Taking the whole thing, however, I do not see any advances whatever in regard to the culpability of Colton beyond the position which Wilson occupied. Nor have I found much argument beyond those suggested by Wilson and Tevis in regard to the improbable nature of the charges and the charity with which after his death his conduct should be judged, or the difficult circumstances in which the defense is made by Colton's representatives. We are not now, for the purpose of this case, to pass

an absolute judgment upon the guilt or innocence of Colton. If the charge be discredited the accuser is not, therefore, condemned. They certainly have not been altogether disproved. In fact, only to a very small amount. Of course, not all of this very large indebtedness was really charged to have been a misappropriation. The pleadings on both sides speak of them as such, but on the face of the exhibit the contrary plainly appears.

I do not care, however, to enlarge upon the matter. I am prepared to finish.

That the full extent of the representation was that the statement contained a result shown by their books, as reported to them by Mr. Gunn, and, further, that Wilson knew how the statement was made up, all the evidence for each item of the charge. That while the statement was in some respects inaccurate, as Wilson well knew, yet, in the main, as a matter of accounting, it was correct. That the defendant did not cause to be prepared or made any charges in reference to it for the purpose of coercing the plaintiff into an unjust or any settlement of her relations with them, but the account was presented in good faith and for the purpose of collecting the amount claimed from the estate of Colton. In fact, having found these apparent discrepancies on the books, I do not see how a disclosure to the plaintiff could have been avoided. There would not have been a full disclosure of all the facts had they suppressed this.

I now come to exhibit E, attached to the complaint, or rather to the complaints, made with reference to the matters contained in it. It is averred in effect that the defendants, to influence the action of the plaintiff and induce her to execute the assailed contract, represented that all the stocks and bonds received by her from the estate of her deceased husband were insufficient to pay the million-dollar note, Colton's indebtedness to the Rocky Mountain Coal & Iron Company, and Colton's proportion of the indebtedness of the Western Development Company, and Colton's indebtedness to themselves. That to sustain these representations they presented a statement of the assets and liabilities of the Western Development Company, which is exhibit E. They also represented that the Western Development Company was insolvent and unable to pay its debts, and that it would be necessary to return the dividend improperly made by Colton. This dividend composed a large portion of the assets of Colton's estate. It is also averred that they represented and asserted that the valuations contained in the statement were the true and full values of the assets of the corporation, and they further represented that it was necessary to, and they intended to, and would forthwith cause to be levied an assessment of many millions of dollars upon the capital stock of the corporation. Then follow allegations of reliance upon the representations, and her subsequent discovery that they were false.

It appears that Wilson first called at the office of the defendants and desired to know the value of Mrs. Colton's interests there. He was at once informed that there were difficulties in the way. Mr.

Crocker had already informed Mrs. Colton in response to similar inquiries that the business was so extensive and so ramified that it was difficult to give any correct opinion about it. As early as January 15, 1879, Wilson had commenced making inquiries to find out what Colton had and what it was worth. In a letter of that date to plaintiff he relates an interview with Mr. Crocker. He was then told that the Western Development Company was largely indebted, and it might be necessary to recall the dividend; that the settlement of the business of that company was a necessary preliminary to getting at her rights. He sought for a statement of the assets and liabilities of the company, and, having in some way obtained a rough statement, was informed by Mr. Crocker that he must not rely upon it, that they were preparing a more perfect statement, which he would furnish. The statement, exhibit E, was made out and presented to Wilson as the more perfect statement promised. The original statement was made up by Mr. Douty, but without the valuations. Wilson also had this original statement made out by Mr. Douty. The statement was changed in some respects by Mr. Brown, and the value of each item, or an estimate of the value, added. These values were made at the request of governor Stanford, and Wilson was informed that the values were the result of the combined judgment of all the defendants and all through the negotiations which followed they insisted that they were the very highest values. These valuations became a very important matter in the negotiations, and were the subject of frequent controversy between Wilson and the defendants. There can be no doubt, therefore, that the statement was furnished to Mr. Wilson as a correct and full list of the assets and liabilities of the Western Development Company as they appeared upon their books, and that the values were in the negotiations represented and insisted upon as the highest of such assets in the opinion of the defendants. It is more important here to consider the circumstances under which this statement was furnished, and, somewhat more minutely, how it was regarded and treated by the parties, to understand just the force of the representations, the purpose for which they were made, how they were received, and the degree of reliance which was placed upon them and which the plaintiff was entitled to place upon them.

Along with exhibit E, and exhibit 17, Douty, which last is the original from which exhibit E was made, there was also furnished an inventory of the property turned over by the Western Development Company to the Pacific Improvement Company. Wilson says that he regarded this transfer as absolutely void, and the inventory only as a convenient mode of getting at the assets of the W. D. Co. Douty was also directed to aid with such information as he had; and it is admitted that he did so thoroughly and well. He was the president of the W. D. Co., and its bookkeeper, and knew more of its affairs—outside, of course, of questions of policy, which were entirely controlled by the individual defendants—than any other person. He was Colton's nephew, and had been his confidential clerk.

The inventory was made up under his personal supervision, and he was fully able to explain the meaning of the terms used, and how far it could be relied upon as a correct list.

Under the circumstances, it is obvious that the defendants could not be expected to know much of the affairs of the corporation in detail; and no human being knew or well could have an accurate knowledge with reference to all its assets and liabilities. It must also be remembered that the parties did not deal with each other under the influence of any relation of trust then known to them. She did not know or understand that they owed her any duties; nor did they furnish these statements in discharge of any such obligations. If she relied upon them, it was not because of any trust or confidence in them or their obligations to inform her. They dealt as strangers, and at the time each party believed they had a right so to deal. She now seeks to avoid the contract as well on the ground that she contracted in ignorance of this relation as on the ground of their failure to perform its obligations.

All the way through, defendants assumed the right to negotiate as strangers; to cheapen what she had to sell. Very early the question arose: Can the W. D. Co. pay its debts without the return of the dividend? There was no controversy about the liabilities; the whole matter was reduced down to the question of values—the value of the assets of the W. D. Co.

Of course, the value either way after realizing the assets, if the dividends were returned, depended upon the same question. I do not see that plaintiff, or Mr. Wilson for her, ever demanded or expressed any desire for these valuations, unless it was understood from the desire to know the value of Mr. Colton's interest there. They seemed to have been volunteered, and I think it not unfair to presume that they were offered as an argument or showing to support their claim that the return of the dividend was required to enable the corporation to pay its debts. The next inquiry naturally is, whether these values were statements of fact, or were mere expressions of opinion for which the person expressing them cannot be held responsible.

I don't overlook the cases in which mere expressions of opinion have been held to be such representations, as, being grossly false and made in bad faith, will suffice to avoid the contract. Uncertain as such statements are, the case may arise in which the one party must necessarily rely upon them as affording all the information he can possibly get, not only as to values, but as to the subject matter of the contract. It becomes no longer a mere opinion, or, if in some cases it is a mere opinion, they are cases in which the defrauded party had the right, under the circumstances, to the benefit of the sagacity and judgment of the person making the representations.

There is no claim that any of the stocks or bonds in question had any market value unless it be the bonds of the Southern Pacific, and as to these the claim is rather faintly made, and certainly the evidence plainly shows they had none.

What are the values, then, which are expressed in exhibit E. The phrase intrinsic value has been used, although this is not the meaning insisted upon by the plaintiff. But if there was no market value, what other value could it have? This phrase is used in opposition to market value, or fancy value, or special value to some individuals, and perhaps in other connections. Except as a comparative term it is difficult to extract any meaning from it.

Value is said to indicate the relation the purchasing power of one commodity bears to the purchasing power of other commodities, and generally to money, the universal medium of exchange, and which furnishes, therefore, the criterion, or unit, for the estimate of all commercial values. This is the only meaning it can have here, or which would have been deemed material in these negotiations.

The vital question was: How much can be realized from these assets to enable the corporation to pay its debts and divided among its stockholders? The values must have been estimates of what these securities would bring if placed upon the market.

When we prove the value of such securities, we place on the stand an expert. Now, what must he know, to make him an expert? Why, simply what the securities have sold for, and an acquaintance with the market sufficient to enable him to say that at a certain time they did bring, or would, if offered, probably, have brought so much.

These experts are not required to know anything of the properties represented by the securities. It is really a fact to which they are called—what did they sell for? It would require a very different species of knowledge in an expert to tell what a certain stock would bring, if offered, it having no market value established.

The elements which make up the value of railroad stocks, are very numerous and uncertain. In the best assured stock of the kind, there must, necessarily, be a large margin of uncertainty. When we have determined what the security ought to bring, we all know that we are still far from knowing what it will bring. If this were a determinable quantity, *stock* gambling would cease to be synonymous with dealing in stocks. The evidence abundantly shows how delicate a science the manipulation and handling of stocks and other railroad securities has become, and how difficult the task of creating and maintaining a market for it. The contract with the syndicate to sell the S. P. bonds proves, both that previously there had been no market for the bonds, and how difficult it is to dispose of the securities, even with a contract assuring the continued solvency of the securities; which seems almost like taking a bond of fate.

In short, there being no market value for these stocks and bonds, any statement as to value was necessarily a mere opinion. And all the circumstances show that it was so regarded. Why could not Wilson find out the values from some one else? Of course, because they had no established market value, and when it was said that no one knew except defendants, as is still said and constantly repeated here during the trial, it must mean, not that there is any absolute value which they refuse to communicate, but they are in a condition

to form an opinion better than any one else. If the word value had reference to the productiveness of the stock, or the earnings of the roads, Wilson seems to have been fully informed on the subject. Nor did the plaintiff or Wilson accept or rely upon these values. Wilson's memorandum, made during the negotiations, show page after page of computations upon different bases.

He says he regarded them as estimates. In fact, all the way through, the controversy was over these values. He regarded them as too low. These values meant the terms proposed by the defendants. Wilson demanded more, and to enforce his views always insisted that the values were too low. And, finally, when in despair, he communicates his failure to Mrs. Colton to get a better offer, he says. They seem relentless, immovable and inexorable, and assume that they know values better than others."

By this, he says he means that they stood upon their values, and therefore upon their offer. In other words, they stood relentlessly immovably and inexorably upon their values as a basis of settlement.

This was Wilson's complaint against them. It was what he attempted to move them from. It was the very bone of contention. Plaintiff did not rely upon them. It was her grievance that defendants would not adhere to them.

But the compromise itself shows that it was not made upon the basis of these valuations. An additional consideration of two hundred thousand dollars in S. P. bonds was paid, worth according to the valuation in exhibit E, one hundred and twenty thousand dollars. As Colton only had one-ninth interest in the W. D. Company, it would imply an increased valuation of over one million of dollars, if we imply the increase to that company alone, and here certainly was the controversy, outside of the charges against Colton, to which I have before alluded. And, in any event, this additional payment shows that it was a lump settlement, and not made upon any idea that they knew the exact balance which ought to have been coming, or knew the value of assets or amount of liabilities.

Here was a raise at the last moment of more than one million of dollars on the balance which it was claimed would be left after the liabilities were discharged; or if it were a surrender of a portion of their asserted claim against Colton, the showing is equally important. One party claimed, in addition to the conceded property, one million of dollars; the other party will give nothing. A compromise was effected by paying one hundred and twenty thousand dollars. Could anything show more strikingly how the parties realized the uncertainties in the transactions?

In addition to these considerations, as I shall have occasion to show in another connection, the values or estimates in exhibit E were present values, if sale of the assets were necessary for immediate liquidation, and were merely speculative; and both parties, at the time, fully understood that if they were able to hold them a much larger price would, in all probability, ultimately be realized. Now,

it seems to me that the three exhibits E, 17, Douty, and the inventory of property turned over to the Pacific Improvement Company, with Douty to explain them, came as near showing all that the books would disclose on the subject as could possibly be got at. This is all that Wilson could have understood them as purporting to show, and, as already stated, no one could have been better informed than Douty, as to the probability that the showing was a fair one. If I am correct in my construction of the provisions of the code concerning trusts, there were no active duties due from the defendants to the plaintiff, in consequence of any fiduciary relation, beyond that of full disclosure and fair dealing. They were not bound to give her counsel or advise, nor, like an attorney at law, were they bound to see that "their diligence was not surprised" in their service of their beneficiary. In other words, if they informed the plaintiff of what they themselves actually knew of material facts, and afforded her other opportunities of investigation, such as they themselves had, they fully discharged their obligations. But, it is contended, that there were material facts known to the defendants which were not disclosed. Among these, perhaps the most important is that they had been negotiating with certain parties in New York for the sale of the bonds of the Southern Pacific, and the stock of the Central Pacific. It appears that it was left to Huntington to provide for the marketing of their securities. It was his habit, as soon as an issue of bonds was provided for, to begin to talk up, and to prepare the market for them. Some of the S. P. bonds had been sold in the market, but in small quantities, and under such circumstances that in the opinion of the experts, no market value was established. Speyer & Co., prominent dealers there, had been spoken to about them, and the question of their validity had been submitted to a firm of attorneys who were usually consulted by Speyer & Co. There is some little doubt whether this talk with Speyer & Co. was before the compromise, but, in all probabilty, it was before. No arrangement or contract of any kind had been made, however, at the time of the compromise. About five months after the settlement, a contract was made with Speyer & Co., for the sale of bonds to the amount of one million dollars, with an option of nine millions more, at prices much above those set out in exhibit E. About the same time, a syndicate was formed for the sale of C. P. stock at seventy. There is no averment in reference to this matter in the complaint, but, on the trial, defendants' attention was called to the claim of plaintiff in reference to it. Wilson says he had no adequate idea of this contemplated arrangement. It does appear, however, that Wilson knew that efforts were then being made to place these securities on the market.

He was distinctly informed of this, under circumstances which made it manifest that it was not mere street talk. Now there was, so far as disclosed, nothing fixed, definite or certain which they could have informed Wilson or the plaintiff of. If Wilson had deemed the matter of importance, he knew enough to put him upon inquiry.

And, apparently, he did know about all he could have been told. Every one knew they would be sold as soon as a fair price could be obtained; and this was plainly taken for granted, both by Wilson and Tevis. They had then no contract, and but for the "boom," as it has been called, probably would not have had.

Another matter, concerning which it is claimed there was not a full disclosure, is that there was due the Western Development Company from the Northern Railway six hundred and thirty-seven thousand dollars for work done, which they intended to allow, and which was allowed within a week after the compromise, and to pay which the Northern Railway issued six hundred and ten bonds of one thousand dollars each, with back coupons sufficient to make up the amount. There is no evidence that this allowance was contemplated at the time of the compromise, but it transpired so soon afterward as to suggest it.

The Western Development Company had built the road and turned it over to the Northern Railway Company. After the W. D. Co. had practically gone out of existence the roadbed above Benicia sank. The Pacific Improvement Company filled the sump at a cost of eighty-five thousand dollars. This was charged to the W. D. Co. on the idea, I presume, that the roadbed had been imperfectly made, and, therefore, that company had not completed the construction. It was charged to the expense account of that supposed contract. Proceedings were inaugurated after the compromise to recover from the Northern Railway six hundred and thirty-seven thousand dollars for this expenditure of eighty-five thousand dollars. Douty, as president of the Western Development Company, was ordered to write a letter to the president of the railway making the claim.

The same authority requested W. V. Huntington, president of the railway, to have the claim allowed. The claim was allowed, of course, and the bonds and coupons issued, the order admitting that the claim was one of undoubted merit. The officers of the corporations were all really employees of the defendants, and the defendants and Mark Hopkins then owned all the stock—at least, practically. Regarding this as really an allowance of a claim, it was apparently a mere gratuity. But evidently it was nothing of the kind. The defendants and the estate of Mark Hopkins, owning all the stocks and bonds of the corporations, determined to issue more bonds upon the road, which was their property. Had they seen that their interest required it, they would doubtless have mortgaged the road for millions more, instead of a few hundred thousand. So long as it was their property, and in reality unincumbered, I see no reason why they might not do so, nor what harm it would do the plaintiff if they did. Why they resorted to this hocus pocus of a pretended allowance on account of construction does not appear, but reasons can easily be imagined. The right to pledge the property for their debts is one incident of ownership. When she sold her interest to them, she knew this was an advantage they acquired by the sale; and when the bonds were issued they merely had their

own paper secured upon their own property. They own the property for this purpose as much as for any other. Whether they should mortgage or not, or for how much, are matters of mere policy.

That the defendants have managed these corporations to advance their individual interests, and have treated the corporations as their individual property is certain. In an affidavit filed here during the trial, the plaintiff says, with reference to the management of the Central Pacific:

"They have systematically subordinated the interests of said corporation to their own individual uses and purposes, and have caused said corporation to borrow large sums of money at a burdensome rate of interest for their own individual uses and free of interest, and have used the moneys that were in the treasury of said company for their individual purposes to the extent of many hundreds of thousands of dollars, without giving any security or paying interest therefor."

There is a large measure of truth in this charge, and it applies not only to the Central Pacific, but to all the corporations under their control, and to the times before Colton's death, as well as after. So long as there were neither stockholders nor bondholders other than themselves, I see no reason why they might not do so.

The same reasoning applies in the same way to the matter of ninety-two thousand six hundred and forty dollars in the bonds issued to them after the compromise by the Northern Railway and San Pablo & Tulare. Here the company also owned all the stock and bonds of the roads. There was here, however, a contract which Wilson must be held to have known. Having consulted freely with Douty, I do not see how we can avoid charging Wilson with knowledge of the basis of this estimate, exhibit E. In regard to the sinking fund bonds said to have been appropriated by S., H., H. & C. at less than their real value, it is hardly necessary to speak. There is no charge with reference to it in the complaint, and on reflection I feel bound to hold that there is no competent or sufficient evidence of their value. It seems this sort of thing had occurred before or during Colton's lifetime. I feel a suspicion that the bonds were acquired for S., H., H. & C., and that all parties knew that their temporary rest in the coffers of that company was merely a stage in the process of deglution. The subscription to the stock of the Northern Railway and the San Pablo & Tulare is a matter not so easily disposed of. This I have said I consider admissible on the issue as to the solvency of the W. D. Co. Yet it ought to be considered in view of the fact that defendants' counsel did not understand until the argument that they were claimed as assets.

These subscriptions were made in 1871 by the individual defendants and Mark Hopkins as organizers of the corporations. The statute required a subscription of one thousand dollars for each mile of the proposed road. These subscriptions were evidently made to comply with the law. Colton was not then associated with the de-

fendants in railroad matters, nor was the W. D. Co. formed. The ten per cent required by law was paid, but nothing more. The stock was surrendered to the W. D. Co. The W. D. Co. debited itself with the portion unpaid. It is now sought to charge the defendants with this amount as an omitted asset of the W. D. Co.

I have said that the relation between these parties was that of joint adventurers, or, at least, of persons jointly working to accomplish a common end. We find that when a new corporation is needed to carry out their projects that it has been formed under the auspices of the W. D. Co., which is their common agency; that sometimes their employees became corporators and the stock is held for the associates.

Prior to Colton's advent into the association, the relation of the other parties to each other was the same, all the stock of the corporation formed would naturally belong to the associates. The balance not subscribed for they got on the construction contracts, and since, it seems, the value of the bonds exceeds the cost of construction, the stock really, if we look upon the bonds as assets, costs them nothing. Indeed, it has been said as to some of these corporations, it is only valuable for purposes of control. It is impossible to suppose otherwise than that the subscriptions would be regarded as burdens which the associates would expect to bear equally. I think it was admitted that in some cases of corporations being formed the subscriptions were really paid by the W. D. Co. I can see no real reason for a different rule being applied to these. Colton allowed these subscriptions to remain unpaid for years, and I do not doubt but he thoroughly understood that they were not to be paid.

As to the unfinished contracts, Wilson knew all about them. He testifies that he told the defendants that they could not take the assets of the W. D. Co. to themselves by the pretended sale to the P. I. Co. That he did not recognize the transfer, and that there were unfinished contracts on which large profits would be made, and that the W. D. Co. was entitled to these profits. This, independently of the fact that these main contracts had fallen by lapse of time and failure to perform before the death of Colton, will dispose of that matter.

There are many other items claimed to be assets of the W. D. Co.; that is, assets not mentioned in exhibit E. Some of these are confessedly so; among them, the item of one hundred thousand dollars paid out by Huntington, and which he is unable or unwilling to explain, and other small items which it is not necessary to mention here. On the other hand, the defendants claim, and have shown, that there are many assets in exhibit E which did not in fact belong to that corporation; also certain liabilities not there enumerated. It is strenuously insisted by plaintiff's counsel that these matters are entirely immaterial; that having furnished a statement of the assets and liabilities, they are bound by the statement; that the statement was the basis of the settlement, and if it be materially incorrect

either way, plaintiff is at liberty to avoid the contract. But I think, in the first place, this shows a misapprehension of the character and purpose of the statements. It was in effect only understood to be a showing of what was contained in the books, as already stated. To this extent it was correct. Then the parties plainly did not settle on the idea that they knew the assets or liabilities, but evidently recognizing the fact that there was very great uncertainty in that respect. But a distinct issue, as elsewhere stated, was made as to the solvency of the W. D. Co., and its inability to pay its debts without the return of the dividend; upon this issue it was clearly admissible. The showing made in the exhibit was in support of the representation of insolvency, but still only of the condition of the books. With such a vast mass of assets of such various kinds and so widely scattered in a business of such dimensions still going on, it could not be that the books would ever be entirely up or fully show the assets and liabilities.

Under such circumstances common sense and ordinary ideas of justice would suggest that it might be shown that at least the statement was a fair one; and since, if we take the position that the values were relied upon, the statement becomes merely a list of money items; what difference can it make how each amount was made up? Of these counter-claims there can be doubt that exhibit E includes the so-called Miller assets, valued at one hundred and nineteen thousand dollars, which did not, in fact, belong to the Western Development Company, and omitted of its liabilities a demand in favor of the Southern Pacific for failure to furnish the road of about one million of dollars. At all events, the deductions to be made from the enumerated assets, and the additions to be made to the liabilities, will more than counterbalance the errors on the other side. In short, on the subject of concealment or intentional misrepresentations as to the *corpus* of the assets, I find no evidence of such in the record. The case could hardly have afforded more conclusive evidence that there was nothing of the kind. Every one knew and must have known that no human being could accurately know the vast business in all its details. The books were thrown open to Wilson or to any expert he might see fit to employ. He did spend many days—I may, indeed, say months—in the examination of the books and papers, and had the assistance for this purpose of the book-keepers and officers of the different corporations, who were directed to, and did afford him in good faith, all the aid in their power. Wilson, for months, devoted a great deal of time to the investigation, and only desisted when he was convinced that further efforts in that direction would be of no further use.

Plainly the defendants represented their own views in the negotiations, and sought to make as good a trade as possible. I believe the values in exhibit E were, as already stated, for that purpose. Within a few months afterwards they were able to realize enormous profits over these prices upon the property acquired from the plaintiff. There is a natural inclination to judge the transaction in the

light of this after event. In fact, it requires a strong effort not to do so. But the values were present values, made in response to the determination, or perhaps the necessity, on the part of Mrs. Colton to sell out, and it was not denied at the time that the defendants hoped to realize a large advance on those prices. She insisted upon immediate settlement. She was promptly told that the value of her interests could not be ascertained except by liquidation of the affairs of the W. D. Co. She still insisted upon obtaining some definite balance, and being allowed to retire free from the business without further liabilities or complications. These values were furnished as a basis for a settlement, being an estimate of values which might be realized by immediate liquidation. But they admitted that they all the time expected to get more for the assets. Wilson says they represented that without the return of the dividend the corporation was insolvent; the assets would not pay the debts without careful nursing and management, which would take a very considerable period of time. By watching and carefully nursing, the assets could be made to pay, and would. In such event, of course, they would have had the dividend clear after paying debts. This is all Wilson claimed, and it seems they admitted to Wilson that at least they hoped to do as much.

Tevis shows that he understood the matter of these relations. He was very familiar with the railroad system, and particularly with the Southern Pacific. He thought the values merely conjectural, highly problematical. He says the values in exhibit E were, at the time, fair estimates. That, in his interview with the defendants, while acting for the plaintiff in the negotiations, he stated in effect that, under their administration and what they would do, the connecting roads they would build; considering, also, the lease to the Central Pacific, they would ultimately make the bonds par. They, in reply, claimed his estimates were in advance of actual values; that they were not bound to go on and create a market for these securities. That other roads were being built in competition, and the whole country was full of gloomy prospects and they would do nothing, but preferred Mrs. Colton should go on with them, pay Colton's note and contribute her share. Tevis replied that she was not able to do this, but would sell for less than she could make out of it. Here we see admitted that plaintiff expected that they might realize par for these bonds, and understood, or, at least, her agents did, that she was getting less than she would if able to stay in and contribute her share. But, it is said, that the defendants had themselves placed a higher value upon these securities and again, within ten days after the assailed transaction, paid a debt to a fund for which they were trustees, in Southern Pacific bonds, at ninety cents.

The Western Development Company, on September 1st, paid their note of three and one-half millions to one of the Central Pacific sinking funds in these bonds, at ninety. The defendants were, of course, the real parties on both sides of this transaction. Their interests, however, were more with the payor than the payee. They

took advantage of their power to pay their own debt with the bonds at a high figure. Of course a trustee ought not to act so. It is said in their defense that they discounted the future; that they felt confident that when the sinking fund would be wanted the Southern Pacific bonds would be worth par, and, therefore, prove a good investment. This is not a satisfactory explanation; but I have already quoted a passage from plaintiff's affidavit as to the manner in which the defendants habitually regarded their trusts. It is somewhat at variance with the view counsel have endeavored to impress me with, in regard to this particular transaction, but is quite conclusive upon the value of such evidence. But in no possible view do such transactions prove what could have been realized for these securities upon immediate liquidation, as practically was insisted upon by plaintiff, and as I think it will appear, the exigencies of her case demanded. There is nothing in proof here to show that if forced to immediate or speedy sale these assets would have sold for more than the estimated values. It seems to me rather, as Wilson evidently thought, that they would have sold for almost nominal sums, unless the defendants had protected them.

In order to understand whether these representations were made in bad faith, and as bearing upon the still more important question to be finally considered, it is necessary to remember the circumstances under which these negotiations were had. The constitutional convention, during the period, completed its labors. The exciting canvass which preceded its adoption, was conducted and the instrument adopted May 7, 1879. This was about the time the estimates were made by Brown. The negotiations were concluded during the canvass for state and county officers, which followed the adoption of the new constitution in 1879.

It will be seen to have been a very remarkable year for political excitement, and that these negotiations were conducted in the midst of it. No one can be unmindful of the business depression which pervaded the whole country, and, in fact, the commercial world, for a year or two preceding these events; and it hardly needs the testimony of the witnesses to prove to courts the extraordinary political revolution then apparently going on in this state. It is now easy to laugh at the fears then entertained, and to scoff the idea that capitalists were, or capital was affected by it. The panic was real, and none the less so, because we can now see that many fears then entertained were idle. It is true that confidence was soon restored, but this cannot restore fortunes lost.

However groundless the fears which destroy markets, while panics last, the result is the same. The misfortune of the plaintiff is that this important transaction was consummated during these gloomy times. Her misfortune, however, must not induce us to judge too harshly those who dealt with her under the same shadow.

May 5, two days before the adoption of the new constitution, the supreme court of the United States affirmed the validity of the so-called Thurman act, which, however proper in itself, took from the

defendants twenty-five per cent. of the net earnings of the Central Pacific to secure the government. The Central then was really the source of all income and the foundation of all credit to the defendants. They were heavily in debt. The debt of the C. P. was over one hundred millions. The letters of both Huntington and Colton show how they regarded the situation. Colton, in particular, was despondent. He wished to sell the construction plant and build no more until they had money in bank. He talks of staying with the wreck and was particularly pronounced upon what was called the communistic tendency of the times. Everybody, he said, wants to take something up and put nothing down. Their coffers were full of bonds and stock, for which there was no market, and their letters indicate that they were carrying their large indebtedness by constantly incurring new debts. Nor was this all. Gloomy as the times were, they could not go out of railroad building.

Their main road, after the Central, extended some hundreds of miles into a desert, and there ended. To render the road valuable, it must be connected with the eastern system of roads. Competition was threatened, and had to be forestalled. The danger from competition is tersely stated by Tevis in his deposition. The value of the assets of the W. D. Co. depended very much upon the completion of these projected roads. Notwithstanding this gloomy condition in 1879, there very soon came what has been called a "boom" in railroad business. In fact, there was an unprecedented demand for railroad securities, and all at once, as it were, the defendants found themselves in a prosperous condition. There had been, perhaps, during 1879 a marked improvement in business in the Atlantic states, but not till 1880 was the effect much felt in California or upon California securities. These are undoubtedly facts, and must not be forgotten in estimating the fairness or morality of this transaction. The compromise was made at the darkest period of this depression, when matters in California were most uncertain. These same facts are also material in determining the condition of the plaintiff, and should be kept constantly in view of what will be said hereafter as to the necessities which compelled the compromise on her part. As to the alleged threats, the evidence does not sustain the allegations. There was no threat to attack the reputation of Colton. Wilson said they merely presented their claims, and, of course, unless settled, they would be presented to the executrix and filed. Then, he believed, they would be made public. If this were so, it would still be the privilege, and, under the circumstances, I think, the duty, of the defendants to present their claim duly verified. This would have been a lawful act. There was no duress, and could have been neither duress nor menace, as defined in the code, A threat to injure the reputation of her late husband would not come within the purview of the code. Counsel has ingeniously shown that the statute does not apply to dead husbands. But there are no such husbands. The widow is a *femme sole*. Of course, it could not have been an attempt to compound a felony or stifle a prosecu-

tion. If it constitute any ground of relief, it must be as undue influence. The plaintiff was, no doubt, extremely desirous of preventing the publication of these charges, and the settlement was made under the expectation that thereby the matter would be hushed up. It did not, however, constitute a part of the agreement, and I find no evidence that the defendants ever attempted to use this desire to influence the plaintiff. The fears seem to have been suggested to plaintiff from the fact that they asserted the claim. I have said that they were justified in making claim to this alleged indebtedness.

Nor do I believe it constituted the chief or most powerful motive on her part to execute the assailed contract. She was tenderly attached to her husband, and naturally greatly distressed by these accusations. It plainly appears, however, that she fully appreciated the condition of things, and was determined to maintain her rights, so far as possible. The remarkable letter to Mr. Hunt shows her fully aware of the difficulties surrounding her, and so far as depended upon herself, confident that she was equal to the occasion. There was no sign of weakness or surrender. The same may be said of all of her letters to Wilson, and her conduct and bearing, as related by the witnesses. She was anxious, but alert, appreciative and determined.

She feared, apparently, almost from the beginning, that they would not settle fairly with her; she believed they were robbing her; had trumped up the charges against her husband for that purpose, and had manipulated the books to prove the charges. Yet, during the whole period of anxiety and distress, she was vigilant, trying, with Wilson, to find out what she could, not only to refute the charges, but to be able to retire from the business with as much as possible. This, indeed, from all the testimony save her own, would appear to have been the prevailing and prominent desire. Hence an expert was not employed to investigate the charges more thoroughly, because, in Wilson's opinion, it would not have much facilitated the settlement if they had been explained.

I think Wilson states the case as strongly as possible, when he says the desire to conceal these charges was an element in the settlement, but not the chief or principal one. It was an element evidently to this extent, that if the matter was to be compromised, it were best to be done before the claims were filed. But neither plaintiff nor Wilson was inclined to sacrifice any material interest to accomplish that result.

Of the other alleged threats, not much need be said; they are not proven. Mrs. Colton was allowed to state that Mr. Wilson told her various things as coming from the defendants, but there was not even an attempt to complete the chain of proof by evidence that the defendants ever did make such statements to Wilson. The alleged representation that it would be necessary to get at Mr. Colton's interests by lumping seems to me to have been strictly true. The claim that they ever refused to allow a separate settlement of the account of the R. M. C. & I. Company's claims is not sustained by

any proof and is flatly denied by Wilson. The subject of the charge of undue influence has been already alluded to, and I have said all I care to say in regard to the charges of misrepresentations against her deceased husband.

The only other claim which can be urged in reference to undue influence or adverse pressure I propose now to state and discuss, as I think this constitutes the gist of the whole case, and presents the real force which induced, or rather compelled, the plaintiff to make the compromise. I will go somewhat into details. In considering this branch of the case, it is necessary always to bear in mind the financial strain which then operated upon the defendants; also, that by the death of Mark Hopkins they had been deprived of much financial force. The W. D. Co. owed the Hopkins estate over four million dollars; also, that they believed they had found proof that Colton had been unfaithful to them; that they were further embarrassed by the dividend which had been improperly declared, of a large amount of the assets of that company when it was owing more than sixteen million dollarr, and had no available assets; that Colton had been allowed to retain his share under the promise that it would be kept, and returned to the company whenever the associates should deem it necessary; that this promise was now frustrated by Colton's death, and these assets were part and parcel of the Colton estate; that Colton owed them and the estate of Mark Hopkins over seven hundred thousand dollars on his promissory note, which was about to become due, and was also secured by only unmarketable stocks; that the defendants were also in a crisis in their affairs, being required at such a gloomy time to expend other millions to maintain their position in the railroad world and prevent competition. These facts must also be remembered to enable us to appreciate the extreme distress and helplessness of Mrs. Colton. Her means were similarly affected by this financial cloud then impending over California railroad affairs, and in some respects her condition was more affected by the panic than theirs. They never lost their confidence in final success. They could hold on and postpone, and to some extent their obligations could wait on their necessities. Their practical possession and absolute control of the properties gave them a great advantage. This was strikingly manifested when, a few months later, they were able to give Speyer & Co. important advantages and guarantees to induce them to buy Southern Pacific bonds.

Colton died suddenly in the prime of life, killed by an accident. His wife was on her way from the East, having been summoned by the news of his peril. He had been busy, almost to the time of his death, as active manager with the defendants of their many large properties. Perhaps, as manager, he was most active. Necessarily his affairs were at loose ends. His widow was sole legatee and executrix of his will. She employed Jarboe & Harrison, a prominent firm, as attorneys, generally, for the estate; but as to her relations with the defendants and the various corporations under their

control, she confided in Samuel M. Wilson. All parties agree that Wilson is an able lawyer, and that he performed the duties he assumed faithfully and well. Precisely when he was employed does not appear. As early, however, as January 15, 1879, he was inquiring of Mr. Charles Crocker for plaintiff in regard to her interests. He was then substantially informed fully of the difficulties in the way of a settlement. He was told of the dividend improperly declared, the large indebtedness of the W. D. Co., the necessity that its accounts should be settled before Colton's interest could be known. Also, of the charges against Colton, which were then, however, undergoing investigation, and were mentioned as matters of doubt.

In fact, the whole case of the defendants may be said to have been opened to him. From that day he devoted such time as he could spare from other business to this matter; and after the adjournment of the constitutional convention in March he devoted a very large portion of his time to this business, up to the settlement. He found it involved in great difficulty. There were the charges of improper appropriations of money against Mr. Colton, which seem at first mainly to have occupied him. There was the outside indebtedness of the estate, exactly how much the evidence does not show, but it could not have been much less than two hundred thousand dollars due to others than the defendants and their corporations. There was the million-dollar note which would become due on the fifth of October then next ensuing, upon which there was due over seven hundred thousand dollars. It was claimed that the assets of the W. D. Co. would not pay its debts within some six millions. Colton's share of the deficit would be about six hundred and sixty-six thousand six hundred and sixty-six dollars. The charges against Colton afterward set out in exhibit D amounted to some two hundred and seven thousand dollars. He found the assets of the estate to be: On deposit with the W. D. Co., four hundred and twenty-nine thousand dollars; a residence assumed to be worth two hundred thousand dollars; a ranch worth fifty thousand dollars, and some other matters probably of little importance. There was also Colton's share of the stock and bond dividend of uncertain value, but entirely unmarketable. There were the twenty thousand shares of the Central Pacific stock, and an equal amount of Southern Pacific stock pledged to secure the million-dollar note. Also, one thousand eight hundred and fifteen shares of the R. M. C. I. stock, said to be worth par, or one hundred and eighty-one thousand five hundred dollars. The main solicitude of Mr. Wilson, aside from the charges which were thought to affect the reputation of Colton, was in regard to the seven hundred thousand dollars which would fall due in October. He made inquiries in regard to the available means of the estate, and came to the conclusion that she could not possibly meet payment due on this note; that the stock pledged to secure it was not marketable, and if sold by the pledgees, would not bring near the amount. He testifies: "I believed if these

gentlemen foreclosed the pledge of forty thousand shares of stock which they held to secure the balance due on the million-dollar note, they would acquire that stock, with a very large sum unpaid—over half a million of dollars, probably—fully a half million of dollars." He also thought they might wind up the W. D. Co's affairs and bring Mrs. Colton largely in debt there.

He frequently conversed with Mrs. Colton about this probable result, and explained to her the difficulty of meeting this obligation, and its probable consequences.

Soon after her husband's death, Mrs. Colton had resolved to get what she had out of the railroad business, if possible; and after this showing, no doubt, she realized the absolute necessity of doing so, or rather, she realized that she was in the power of the defendants—that if they insisted upon a speedy settlement, it would involve her husband's estate in insolvency. The defendants were fully aware of the helpless condition of the plaintiff. The answer avers as a reason for not presenting their claims against Colton's estate that they were repeatedly urged by Wilson and Tevis to desist from so presenting them, and make an amicable adjustment; for, if they asserted their legal rights, they would not only leave Mrs. Colton without property, but would expose the memory of her husband to disgrace. Crocker said they figured that the Western Development Company had not sufficient assets to pay its debts, if it had to be wound up immediately; that it would require a great many years of handling these securities, and to nurse them and bring them before the public. If forced on the market, they would not bring much, if anything. Nobody knew anything about them, and there were millions of these bonds and stocks, and no man would buy except at a low price. They were satisfied that if they were forced to settle these affairs, it would sweep everything she had in the estate. She had not money enough to meet her share of the debts, and there was no other way but a lump settlement.

Now, it being thus manifest to every one, that Mrs. Colton was unable to go on with the defendants, and pay her indebtedness, that not to settle was financial ruin, it was only natural that Mrs. Colton should use her utmost endeavor to retire from the business with a definite sum of money, entirely freed from the responsibility and complications of the hazardous and uncertain business in which they were engaged. All parties, I think, fully understood the situation. The defendants believed, threatening as the aspect of affairs then was, that they could successfully ride the storm, and that the plaintiff could not pay up and go on with them. That her only chance was compromise. Wilson, as stated, at first applied himself mostly to the charges against Colton. These involved the reputation of his dead friend, and would be used, he thought, by the defendants as an excuse for not dealing liberally with the widow of their late associate. They would use it as a reason for standing on their legal rights, and thereby would render Colton's estate insolvent. In this examination he was able to explain some items of

the charge, but generally his investigations turned out adversely. He spent several months in his examination of the affairs of the various corporations, but was evidently paralyzed with the thought that it mattered but little what he discovered, unless the defendants would relent, and recede from the position they had taken. He constantly insisted upon a settlement. He admitted that she was unable to pay the maturing obligations and continue in the business; that she was unable to make the deposit with the W. D. company, which would pay her share of the claimed deficit. This aspect of the case must not be overlooked in judging the conduct of the parties. Mrs. Colton sought the contract. Her agents or counsel seem to have taken the position that the defendants were bound, for some reason, to pay her for her interests, and let her go. The defendants, on the other hand, always took the position that they did not wish to buy her out. No just settlement could be made, short of a legal settlement. The affairs of the W. D. company must be settled and liquidated. Let her pay her note and contribute her share toward the indebtedness of the W. D. company, and they would manage everything as well as they could, and Mrs. Colton should have her full share. They all knew that this was impossible. Stanford testified that Wilson told him she was not able to pay the balance of the million-dollar note, and was unable to find any one able and willing to advance the money. Wilson frequently argued with them as to the value of the assets, and insisted that they ought not to stand upon their legal rights, but give her a liberal sum; that whatever the present value of the securities, they knew that ultimately, when their railroads were completed, they would get more for them. The defendants, in effect, said very likely; then let Mrs. Colton pay up, and we will do as well for her as for ourselves. And when reply was made, you know she can't do that, and must sell, and is willing to take less than the real value. It was replied: "Then if she cannot meet her obligations and must sell now, the values are matters of pure speculation." Mr. Huntington arrived in California July 15th. The next day after his arrival Mr. Wilson urged him for a compromise. He was promply told that it was of no use. Huntington did not wish to increase his interests in California. They had all they wanted to do, and would much rather she would keep her interest, pay the debts of the Western Development Company and square the other accounts, and if there was anything left, let it be settled in that way. Finally, however, if she insisted upon going out, or was unable to stay in, they would settle on certain terms. These terms were not at all admissible, and were promptly rejected. Wilson was, however, now in despair. 'Twas idle to think really of litigation. They could not defend against the million-dollar note. It would soon be due, and, to enforce that, he thought, meant the insolvency of his client. He expressed his feelings in a letter to Mrs. Colton August 19th:

"They stand very fixed on their first proposition. They would not listen to mine of one million of dollars, as we determined. They

seem relentless, immovable and inexorable. I am sorely puzzled, but we need have no immediate fear of anything being done by them; not at least for ten days. In the meantime we must clearly count on our strength and calculate the risk, and trace out all results to their possible end. * * * They ever refuse arbitration; they assume that they know values better than all others, and evidently feel that they are masters of the situation."

He says he meant by this "they would not advance a dollar on their proposition which I have related, and said that that was their ultimatum, and they would not give any more, and satisfied me at the time that was an ultimatum with them; that it was not said for effect, but was a matter for me to accept it or not; that that was the end of the negotiation with me. It was stated that Mrs. Colton might go ahead and fulfill her contracts—they would prefer she would do so." He says also it had been mentioned several times in their later negotiations that they did not care to buy her out. They would do it at certain prices, but would prefer that she should go on and meet her obligations, and be enabled to meet her advances for the needs of building railroads if they would be called for from time to time. They had not money to pay out; they wanted money.

Further he says: "I feel to a considerable extent that I had not accomplished what I hoped to accomplish, and things looked disastrous and bad, and my inference was that they stood upon their values they had fixed to the different pieces of property which was before us—the Western Development Company, the railroad company, etc.; that they knew values better than other people. They felt that they were independent of our accepting the proposition, that we could accept it or not, as we pleased."

This shows, I think, very clearly the point at issue between the parties, and also the precise figure the estimates of values cut in the negotiations. The plaintiff all the time insisted upon a lump settlement, a settlement before the maturity of the note in October. The defendants, whether sincerely or not, assumed all the way through that they did not wish to settle or buy her out. They pretended, at all events, that they preferred a legal settlement. Let the W. D. Co. go into liquidation, or let Mrs. Colton pay the note and advance enough to pay her share of the claimed deficit in the W. D. Co. If you insist on our buying you out, however, we will only do it on this basis. We believe these estimates of value are fair, and we think we know their value better than any one; but if you think differently, pay up, and we will give you the benefit of whatever may hereafter be realized. We prefer that you should keep them and pay your debts.

From Wilson's point of view it was evident that now he was at the point of surrender. But he resolved to make one more effort. Other counselors were brought in, and with their concurrence and the consent of Mrs. Colton, Tevis employed, evidently not as an adviser, although Wilson thereby, no doubt, had the benefit of Mr. Tevis' knowledge of stocks and values. He was an able negotiator.

He was known as a bold, enterprising and successful speculator. He was intimately acquainted with the railroads, and was a man of great wealth, abundantly able to pick up the burden where Colton had dropped it, and carry it along without asking any favors from the defendants. It was something, apparently, that such a man should learn of such opportunities. At all events, Mr. Tevis undertook the matter, and Wilson had the benefit of his knowledge and judgment, as well as his influence and active aid. With Tevis the same style of negotiations continued. He merely tried to persuade them from their values and induce them to be generous, in view of probable gains through increase in market values, or to alarm them with prospects of long litigation, which would embarrass them and injure the standing of the securities. In his evidence he relates his interview with defendants. After a forcible and plausible argument in regard to the charge against Colton, he proceeds:

"Beginning with the Southern Pacific Railway, and going on through the various lists of items, I undertook to use the best arguments that suggested themselves to me to enhance the values of these securities. I insisted that, though they claimed the Southern Pacific bonds were worth only sixty cents on the dollar, that under their administration and what they would do, and the connecting roads they would build, the fact that it was leased to the Central Pacific for a sum of money which enabled them, with the earnings of the road, to pay the interest upon the bonds, that they would ultimately find it for their interest to make them par. That was a very large sum of money. That, controlling the Central Pacific, they had it in their power to continue to pay interest upon these bonds; that everything in the country was now depressed; that there was no market for anything, and when a market existed they would not only get a better price for the bonds, but they would undoubtedly in the end be able to create a market for the various stocks. Upon my theory, as presented to these gentlemen for the purposes of the negotiation, the assets of the Western Development Company were made to pay its debts, and legitimately, as I contended, left in the hands of Mrs. Colton the dividend that had been declared.

"They, of course, in reply, insisted that my estimates were entirely in advance of actual values. That this was fair valuation of this property; that they were not bound to go on and ultimately make a market for these securities. That other roads were being built in competition with the Central Pacific, and the whole country was full of gloomy prospects; that under existing circumstances they thought they had placed a fair valuation upon the property; and that it showed, according to their statement, that the Western Development Company was insolvent and they would do nothing. They said they preferred that Mrs. Colton should respond to her obligations; that she should pay what should be found to be due from the estate on the note of a million dollars; that she should pay what should be found to be due from her on the various accounts, and that she should contribute what was necessary to carry on the various enter-

prises in which they were engaged, and they would be satisfied. I insisted that they knew the fact to be that she was comparatively without means for all these various purposes; that it was for her interest to settle, even for a less sum than she would make out of the enterprise, if able to continue it. I also insisted that they could not afford to have this litigation with the estate of one of their associates, David D. Colton, deceased; that it would be eminently prejudicial to themselves, as individuals, and to all the enterprises in which they were engaged, and that that should exercise a large influence upon them in inducing them to make a liberal settlement with a woman; that otherwise it involved a litigation in which private affairs would be more or less exposed, and in which there would be a very minute investigation into all their enterprises of every kind, personally and as companies; and under all the circumstances I confessed a great surprise that they were not willing to make a very liberal concession, even over and above what they thought was right. That in any litigation they might have undoubtedly the woman would have the sympathies of the public, and in any event it would be very protracted and embarrassing. Therefore, I contended they should concede her the dividend and consent to the proposition which Mr. Wilson had made. We had a great deal of conversation *pro* and *con*. They were very earnest in insisting upon adhering to their values, and were apparently insensible to any appeals, insisting they would not make any concessions whatever."

So he tried them separately, making personal appeals to each.

This is a very graphic and concise showing of the character of the negot ations. I have before quoted a portion to show what weight was given to the estimates of values. It shows as well how both parties appreciated the helplessness of Mrs. Colton, and knew that she had no alternative but a settlement.

It shows also the coercive power in the hands of Mrs. Colton should she select to take the desperate expedient of litigation. It apparently meant ruin to her, but it might also be productive of disaster to them. Staggering as they were already under these heavy burdens, they could not afford this additional weight. Litigation would injure their securities, perhaps prevent their sale, and would embarrass them in many ways. These considerations seem to have been brought home very forcibly by Tevis.

Still, knowing the distress of the plaintiff and her inability to go on with them, they insisted that she should perform her obligations and go on or go out on the terms proposed. They insisted they were not bound to discount the future of these securities for her, thus giving her the benefit of their contemplated enterprises and the expenditure of more millions. She was not entitled to the profits when she would not share the risks.

Much more testimony might be quoted showing how the parties at the time understood the issues between them and how they regarded the representations made. The defendants finally consented

to improve their offer by adding two hundred thousand dollars in Southern Pacific bonds, and this was accepted.

One more citation from the evidence, giving Mr. Wilson's reasons for closing with the offer, will, I think, complete the statement of the case and show conclusively the motives which actuated the plaintiff, and just how far any representation or threat or adverse pressure affected her.

He says: "They asserted a series of claims of these different companies against Colton's estate, making considerable sums of money. Also, these gentlemen held the note of General Colton for a large portion of that million of dollars, secured by stock, and, of course, General Colton was interested in the Western Development Company, and I came to the conclusion, on investigation, that if these gentlemen were to rely upon their legal rights in the matter, they would involve the estate of General Colton in insolvency: That if they prosecuted that note when it became due, or sold the securities, that there would be no purchaser in the market except those gentlemen themselves; that, in this market, a large block of Central Pacific Railroad stock, twenty thousand shares, and Southern Pacific Railroad stock, twenty thousand shares, would have no purchaser at all, except themselves, and they would buy it in at just such prices as they chose, and thereby leaving a large deficit in the balance due on the million dollar note; also, that when the Western Development Company's affairs came to be settled up, that as their stock and assets, I should say, consisting very largely of stock and bonds, and there would be no purchasers of them in the market, except these gentlemen themselves * * * * they would be enabled to purchase the stock and bonds, and assets generally, of the W. D. Company at their own prices, and without competition from any purchaser who would appear publicly, and the result of it would be that the institution would be made largely insolvent; that the insolvency of the estate of Colton would result whether the claims against the estate arising from the alleged discrepancies, were made good or not; the question was, whether these gentlemen would prosecute, as against Mrs. Colton, these claims, and I considered a great deal whether they would as against a lady who had lost her husband, their former partner, whether they would undertake to rely upon their legal rights and pursue their legal rights. * * * I believe they would, and their justification would be the views that Mr. Huntington asserted.

"Having come to that conclusion, I believe, at the time, unless Mrs. Colton made this settlement, she would be involved in insolvency, and to save her from that, and at the same time to save any public investigation of these charges against Mr. Colton, and the difficulty of proof I saw in the way, while they could make a *prima facie* case and throw the burden on us of explaining them, I believed it would be much better for her to accept the settlement." Afterwards, being asked if the presentations of the claims to the execu-

trix for allowance would not have embarrassed them, and if he did settle them to avoid this, he says:

"This thing had just as well be settled then as afterwards; the time had arrived to say yes or no. Yes ended it; no was litigation. The time had arrived. I had negotiated until I had run myself out. Mr. Tevis was called in. Mr. Tevis, Mr. Huntington and these gentlemen could act quickly or never. There was no sense in the prolongation of it. The time was ripe for yes or no.

"Ques.—And the non-presentation of these claims was a consummation that you desired?

"Ans.—Why, of course, if we could make the settlement why let the case go on the public record? Why let it go abroad, if I could make a settlement? It was time to make a settlement. We made it or did not make it. Why should we delay it?

"Ques.—Well, you had been delaying it for ten months?

"Ans.—And we had all exhausted ourselves over it. I had spent more time over it than I have done in lawsuits where I had gained twenty thousand dollars. I had exhausted myself and tired myself out. I sacrificed my private interests and had worn myself out. I had abused these people to the extremity almost of fighting personally. The thing had ended. There is an end to everything. The time was ripe to consummate it one way or another. I was prepared to take their favorable answer or go into a fight. There was no sense, no object, no purpose in longer delay."

These statements from these two witnesses, both of whom were acting for the plaintiff, constitute most important testimony. They show us, as near as was possible, the parties face to face, and almost lay bare to our view their secret thoughts and motives. They show quite plainly:

That the parties were not acting under the influence of any relation of trust or confidence.

That the valuations were matter of controversy all the way through, and were put forward as a statement favorable to defendants, and as such maintained by them and controverted by the plaintiff.

That the charges against Colton affecting his reputation, while deeply regretted and resented by Wilson, were always held as subordinate to the main question of the interest of plaintiff.

That in the judgment of Wilson there has been sufficient investigation of the affairs of the corporations, and that he therefore does not care for further time.

That he was thoroughly convinced that she could not discharge Colton's obligations and go on with the railroad business, and therefore must compromise on some terms or become insolvent.

That the defendants well knew her inability to pay up or go on; yet when importuned for a settlement and to purchase her interest, always took the ground that they did not wish to compromise or buy her out, but insisted that she should pay up and contribute her share, but indicated a willingness to buy her out at certain prices

and on certain terms, believing that her refusal to comply with their terms meant insolvency for her.

Also, that it was understood that if Mrs. Colton were to take the desperate ultimatum of refusing to compromise on their terms, while it meant certain ruin to her it also meant great loss to them; far short of ruin, probably, yet so great and certain as to cause us to doubt, not to use a stronger word, the sincerity of their oft-repeated protestations that they did not wish to buy her out.

It also shows that it was then anticipated by both parties that if the defendants could ride the storm, as it was confidently believed they could, and hold on for brighter days, they could and would realize much more for the assets of the W. D. Co. than they valued them at in exhibit E.

Now the question arises if these are the true facts, and the plaintiff was induced, or rather compelled, to execute the impeached contract by the stress of the circumstances I have mentioned, does it make a case of undue influence or adverse pressure, which renders it optional with the plaintiff to rescind? The circumstances are certainly capable of being stated in such a way as to have a very ugly look for the defendants.

It may be said that they were insincere when they pretended they did not wish to purchase her interest, and that they abstained from over pressure because they knew that her necessities made them masters of the situation.

That their interference was assumed to drive her to despair and absolute surrender, knowing that she could but realize that litigation at that time meant insolvency for her. However valuable her stock in the various corporations and the bonds obtained under the dividend might really be if she were able to hold them, they knew that she could not hold them, but must surrender to pay her indebtedness to themselves at any price they chose to fix for them; or, in other words, although her property might possess great value, yet as no one would buy it or loan upon it, because it had no market value, and also because its future value would depend largely upon their future management because of the agreement between themselves to act together, therefore, she was completely at their mercy; that they did purchase at their own terms, and within a few months were able to realize a profit of many hundred per cent upon the trade. Notwithstanding her known distress and inability to discharge Colton's obligations, they stood upon their cold rights as the alternative of their offer, and counsel has used expressive language when he says: "'Tis Arctic weather when Huntington stands on his cold rights."

I know, of course, that the situation may be very differently stated, but I have sought to show the circumstances of alleged oppression as strongly for the plaintiff as possible. Now, if the legal positions assumed by counsel be in all respects sustained, and the relation of the parties be held to be fiduciary, it may be that these circumstances would of themselves authorize a rescission of the

contract; but, unless there did exist some such relation, cold rights are controlling matters in courts of justice. It seems to me the simple question is, did they take grossly oppressive and unfair advantages of her necessities or distress? There was no weakness, at least no mental weakness, on the part of plaintiff. She did not rely upon the defendants. She did not think that she had a right to rely upon them as her trustees; and she knew that the terms proposed were unfair and oppressive. She believed they were robbing her. She had able and faithful advisers; there was no concealment or lack of disclosures, and no misrepresentation, save with reference to the one hundred and sixty-eight shares of R. M. C. & I. stock, of which I have spoken. There were no threats which could or did induce her to execute the contract. It becomes very necessary to inquire whether there was gross inadequacy of consideration for the compromise.

Here, as I have already had occasion several times to repeat, it is very difficult to judge the transaction, as should be done, as matters then stood. It is very difficult to consider the question without, to some extent, regarding it in the light of after events. It requires a great effort to place ourselves in the positions of the parties then occupied, and look upon the prospects and possibilities and uncertainties as they did, and in reason must have regarded them. We are prone to hold the defendants responsible for the gift of prophecy.

The properties are all of a class that are very fluctuating and uncertain in their values, even after a market value has been ascertained by actual sales. This is strikingly shown here from the fact that Central Pacific stock at one time, as shown by the evidence, was selling at such a rate that the defendants could then apparently have realized a profit on the twenty thousand shares of Central alone, which belonged to Colton's estate, after paying the note of about three-quarters of a million of dollars. Wilson, after making inquiries, concluded that if this stock were then sold, together with an equal amount of Southern Pacific stock, it would lack at least a half million of paying the note.

Before the trial closed, it was stated in court that it was again selling at a rate which would have left a deficit on the note.

Indeed, while the case was on trial, June 27, 1884, the plaintiff presented to the court her affidavit to the effect that the defendants were on the brink of insolvency, notwithstanding the great values attributed to these securities, and without apparent reverse or disaster, except the existence of one of those panics which seem almost periodically to convulse the commercial world.

But it is interesting on this question of adequacy to inquire how a market was made for these securities. The most important item of this species of property consisted of Southern Pacific bonds. The plaintiff claims they were worth ninety cents, because they were taken at that rate by defendants themselves from themselves, to pay

their own debts to the sinking fund, and because of a few sales now and then, at least apparently, on the stock board. Yet, a few weeks before Colton's death, he consented to let the W. D. Co. offer Stanford sixty-five cents for the three million dollars of them. It is impossible that they should have offered Stanford less than market value, if it had any, or much less than the value which the parties themselves deemed then a fair price.

If there had been a market value of ninety cents, it would be equally absurd to suppose they would have made the arrangement they did with Speyer & Co.

There had been some talk with Speyer & Co. before the compromise about undertaking to sell these bonds, but no definite arrangement was made until long after. It was said that Speyer & Co. stood so well with investors that any security they undertake to sell finds purchasers.

The defendants had long been endeavoring to induce this firm to undertake the sale of these bonds, but did not succeed until January 28, 1880. By that time the new constitution had gone into operation and confidence was restored.

Speyer & Co. then agreed to purchase one million dollars of these bonds. But to induce them to purchase, the defendants gave them an option of nine millions more at higher fixed rates. This option is shown by testimony of the experts to have had a market value of several hundred thousand dollars.

Defendants agreed not to sell for one year any of these bonds to any one except Speyer & Co.

Also, to procure a lease from the Central Pacific for five years, which should be extended five years longer, unless in the meantime they made a connection between the Southern Pacific and the eastern system of roads, and that the rentals should continue to be sufficient to pay the interest on the bonds. Nothing could show better than the onerous conditions of this contract how difficult it was even in the improved condition of the times, to sell these securities. Also, the importance to defendants of an early completion of their projected system of railways, so as to connect with the eastern system. And how much the value of what they then had depended upon their ability to go on with these schemes; and it illustrates the dependence of all the values upon the Central Pacific.

And lastly, to repeat, it proves conclusively that at that time these Southern Pacific bonds had not a market value of ninety cents, or even eighty-five cents on the dollar. Of course, the defendants never were able to sell all the securities at the rates they had been able to create for some of them by carefully nursing and manipulating the market. In the beginning they had them all. Their coffers were full of them, and the question was how many the market would take at remunerative rates. And when their bonds were all sold, it is fair to remember, particularly in view of the guarantee which formed

part of the consideration of the compromise, that in a certain sense they were but their own paper. Under our law, as they owned all the stock, they were individually liable for all the bonds. Of course, if the roads were wisely projected and built, they may well have been worth much more than the cost of construction; but, nevertheless, was a very serious matter to be compelled, in order to gain this project, to guarantee, in the face of threatened competition, the success of each one of these many railroad enterprises. But in what way did the defendants use their position as directors or trustees to gain any advantage from, or over, the plaintiff? They were creditors of the estate; it was not unlawful or immoral to collect their debt. From the fear that the debt would be collected came all the fear of Wilson. That alone would involve the estate in insolency. The apprehensions of Wilson and the plaintiff were caused by their knowledge of the situation. No act of the defendants induced these fears, unless the representations as to values may have had that effect, and that matter I have sufficiently discussed. There was no threat in regard to the collection of the note.

The most that could be claimed on this score from the evidence is, that when told that she could not meet the maturing obligations, they still expressed a wish to have the debt paid. It is said that if they permitted the impression to exist and and to have its weight, it is the same in effect as though caused by them. In some cases this may be so, but it cannot be so here. Mrs. Colton, in the beginning, and before any representation had been made or any controversy arose, determined to go out. In this resolution she and her counsel never wavered. They determined that defendants should buy her out for a fixed sum, and that she should be free from all responsibility for indebtedness or complications. The defendants simply said, whether sincere or not, "we don't wish to buy." She and Wilson insisted. Whether the defendants were sincere or not, what right had she to insist after she had declined to deal? I can not see what difference it can make as to the motive, if the conduct be unexplained. As a matter of fact, they did just what they had a right to do. They opened their books to her, directed their employees to afford every aid. They did not urge her to sell. They did not represent to her that she ought to sell. On the contrary, they advised her to retain her property, and promised to do the best they could for her if she would. But I do not see where the wrong would be if they had insisted that their debt be paid. What was there in this relation which could prevent them from insisting that Colton's obligation should be discharged? If the debtor is poor and unable to pay, must the creditor, therefore, refrain from foreclosing the security? They, in effect, finally said: "We desire our legal rights, and to have a legal settlement, but, if you are unable to do better, we will do so and so." She had her legal adviser, and was fully informed of her legal rights. It was not the fault of the

defendants that Colton had undertaken to carry a burden that was beyond his strength. This was their misfortune as well as the plaintiff's. To render her property available, required the expenditure of more millions, and the assumption of great responsibilities. The defendants were not bound to do this for her, and she cannot now claim inadequacy of price because she had not been able to obtain profits which she had no right to expect, except by large expenditures and risks.

The real grievance seems to be that they would not buy her out and pay what she considered full value. She assumes all the time that it was their duty to buy, and upon this proposition to a great extent the case seems to turn, and on this assumption, or that they were urging her to sell, their conduct is judged. I do not intend to enter minutely into the question as to what the plaintiff received for the property she transferred. It is well to remember, however, that she was not forced to retire from the controversy a pauper. She was, of course, relieved from the immense debts, and of which her assets then seemed insufficient to pay from the estate, which Wilson thought, and apparently justly thought, would be entirely swept away if the defendants simply refused to buy; she saved, according to the estimate, more than five hundred thousand dollars in property, with a guarantee to the extent of the individual estates of all the defendants against the immense liabilities and complications of the railroad business.

Counsel have attempted to belittle this last consideration, but I confess I regard it of very great importance. Her affidavit filed or presented in June, already referred to, shows the risky business they were engaged in, and the evidence demonstrates that Colton walked with them over the same slippery ground Colton had expressly covenanted to stand with them and share the liabilities which they had incurred for the Contract and Finance Company before he became their assistant. They were individually liable for all the bonds, amounting with the floating debt to perhaps a hundred and fifty millions; other liabilities to a fearful amount are indicated in the affidavit.

But it is unnecessary to speak of the complications and liabilities of this immense, intricate and hazardous business. Clearly, one could well afford to get out of such business with very much less than the great expectations of profit which were attended with such untold risks. Such perilous business, with its glitter and power, may suit some persons, and the hope it holds out of colossal fortunes may tempt others. The defendants probably delight in these exciting though dangerous ways, "floating," to borrow a somewhat slang expression, "upon the circumstance of the occasion, trusting to the sublimity of luck." But if one of these bold adventurers were to attempt to sell out and retire with his millions, with such a guarantee against the hazards of the expedients by which he has ac-

cumulated them, he would find his many millions in expectancy, and not a few of those apparently in hand vanishing like the baseless fabric of a vision. The guarantee will be found the greatest difficulty. He could not begin to touch, on such terms, the market value.

Taking, therefore, the circumstances of this case, and remembering that the sale was made at a period of unparalleled depression in the prices of every species of property and of very great gloom throughout the business world, and in the fear almost of a communistic uprising in California; that it was a lump settlement, made with full knowledge of both sides; that the subject matter was of most uncertain value, depending upon future events, of which each party undertook to judge for himself, and particularly that the defendants' assertion, after repeated importunities of the plaintiff, I must decline to find that the consideration was inadequate. The plaintiff had competent and faithful advisers. They had examined the condition for months. Every avenue of information was thrown open to them. They did examine for themselves. It does not prove inadequacy if afterwards, when business generally had improved, that they were able to make great gains from the property, especially when these gains were in great part the result of further large expenditures and risks on the part of defendants.

My attention has been called to an alleged difference between section 2,228 of the civil code, in regard to the conduct of trustees, and section 1,568, in regard to frauds. In matters of trust it is said that the slightest misrepresentation or adverse pressure is prohibited, while in cases of fraud it must appear to warrant relief; that the consent, would not have been given but for the fraud, undue influence, etc. But I see no difference. True, by section 2,228 it may be claimed that the slightest misconduct is forbidden, but it only forbids, in terms, the trustee to gain an advantage by such means. This puts it on the same plane, as no doubt it was intended to be, with section 1,568. The question here, too, is, did he gain the advantage by the use of adverse pressure?

I may as well say here that I do not at all accept the proposition that Wilson was ignorant of any fact or circumstance from which attorneys now seek to show a fiduciary relation between Colton and his associates. He had been intimate with the management of these railroad enterprises almost from their inception. For years he had been the regular retained legal adviser of all the corporations and of the associates in the management of them, including the Contract and Finance Company and the Western Development Company. He speaks in his testimony of what he had always understood with reference to those companies. Counsel delight to compare his intimacy with Colton to the friendship between David and Jonathan. When Colton entered upon the discharge of new duties in these important affairs, Wilson was already familiar with their manner of

doing business then, and was Colton's *alter ego*. Colton had a right to confide all these matters to Wilson, for Wilson was then the confidential adviser with reference to all the business, with a salary larger even than Colton's. He knew how they transacted their business, and that they were co-operating with each other to get control of a system of roads.

I have expressed my belief that he knew of the agreement under which Colton was allowed to retain his share of the dividend which he had caused to be improperly made. Indeed, the compromise itself shows that all parties thoroughly understood the relation of the defendants to these various corporations. It takes for granted the extent of defendants' interest and control. Wilson could hardly have taken the first step in finding out Colton's interests without discovering the relations.

There would have been no sense even in attempting to obtain a settlement with the individual defendants, or insisting upon their buying her out, unless he already knew of their association and peculiar relation. The whole proceeding in regard to the negotiation seems absurd if Wilson did not know of other relations between the parties than the ordinary relations of stockholders in the same corporation.

And then Wilson testifies that he looked up the question of the effect the death of a co-adventurer would have upon the right of his estate to the fruits of incomplete ventures, his contribution being largely personal service. He satisfied himself that Colton's rights were not lost because he died before the end of the period for which they had contracted to co-operate in these enterprises.

He speaks of the associates as partners, as members of a firm; and Mrs. Colton represents him as saying one partner could not steal from the other. Contract A was in his hands, and of course he knew of the pledge of stock and the terms, including the right to draw out a proportion as payments should be made on the note. Certainly Wilson did know all the facts which could evidence a fiduciary relation between the parties.

There was, however, a misrepresentation in regard to the four hundred and eight shares of the R. M. C. & I. Company's stock, to the extent of one hundred and sixty-eight shares, valued at sixteen thousand eight hundred dollars. I am not sure that this matter might not be adjusted without interfering with the contract of compromise.

This is the only part of the whole transaction, apparently, which the parties supposed they were settling on accurate knowledge.

There are, I think, some precedents which would justify the court in rectifying this mistake without disturbing the compromise in either respect; but, at all events, it seems to me plain that this is not sufficient to justify a decree of cancellation of a compromise of these large claims. It is impossible to find this to have been an inten-

tional misstatement. In most respects the legal effect, if it be only an unwarranted assertion of a fact, which turns out not to be true, is the same. Still they are not in all respects the same.

An unwarranted assertion, believed to be true, though on insufficient grounds, and which actually misleads, cannot characterise a transaction as a deliberate fraud. I think the defendants believed themselves masters of the situation on other grounds, and for this, if not for better reasons, disdained to mislead, deceive or conceal.

The misrepresentation caused a loss to Mrs. Colton of sixteen thousand eight hundred dollars. Perhaps her situation was such, however, at the time, that Wilson concluded that it would do no good unless he could satisfactorily explain away charges of appropriating one hundred and eighty-one thousand dollars.

In comparison with these figures the sum involved in this unwarranted assertion is small.

But I think, on general principles, in a matter of such magnitude as this, such a mistake or misappropriation would not justify setting aside the agreement, especially where, as here, expenditures have been made by the defendants, on the faith of the agreement, which have materially enhanced the value of the property involved in the litigation.

The main fact, after all, was the unfortunate time in which the compromise was made, and the better times which came so soon afterward. Really I can find no other discovery which has been made by the plaintiff since the compromise, calculated to show the unfairness of that transaction. It seems hard to think that they made or might have made so much out of it, in so short a time; profits which possibly she might have realized could she have held on a few months longer. Concerning this, however, I have already said enough.

The power to cancel a contract is a most extraordinary power. It is one which should be exercised with great caution, nay, I may say, with great reluctance, unless in a clear case. A too free use of this power would render all business uncertain, and, as has been said, make the length of a chancellor's foot the measure of individual rights. The greatest liberty of making contracts is essential to the business interests of the country.

In general, parties must look out for themselves. Each is supposed to know what is best for himself, and neither will be released on this proceeding entirely because one party has judged rightly, or chosen more fortunately than the other. It is an every day occurrence here that people in straightened circumstances are compelled at a disadvantage, or to forego the profits of enterprises which they have undertaken without the means of completion.

In accordance with the views I have reached in this case, of the relations of the parties to each other at the time of the impeached transaction and of the law applicable to that relation, judgment must be rendered for defendants.

Though the plaintiff be found correct in regard to the law of trusts, judgment on the law of findings may probably be entered for her without further trial in the appellate court.

There are still a great many points in the case on which I have not touched. The conclusion to which I have come renders it unnecessary to inquire whether the parties could not be placed in the position they could have occupied had the compromise not been made, or whether, for other reasons, it would now be inequitable to cancel the compromise agreement. Much that has been said, however, has a bearing upon that question, and I end, as I commenced, by expressing my satisfaction in the conviction that all questions involved, both of law and of fact, can be fully considered in the supreme court.

WEST COAST REPORTER.

WHOLE NO. 95. OCTOBER 22, 1885. VOL. VII. NO. 15.

CIRCUIT COURT, DISTRICT OF OREGON.

EX PARTE KOEHLER, RECEIVER, ETC.

October 8, 1885.

DISCRIMINATION BY RAILWAY CORPORATION.—Notwithstanding the Hoult act, a railway corporation may charge less for a long haul than a short one in the same direction, when the rate for the long haul is caused by other lines of transportation competing for business at the point from whence the long haul is made; and where the road of such corporation forms a part of a line of transportation, consisting largely of water carriage, between two principal points, the rate may be made so as to enable it to compete with another road that constitutes a part of another line of water and railway transportation between the same points.

PROVISO TO SECTION 2 OF THE HOULT ACT.—Under this proviso, which excepts from the operation of the act, "goods intended in good faith to be shipped to points beyond the limits of the state," wheat intended by the shipper to be sent directly to San Francisco, or other points beyond the limits of the state, via Portland, may be carried on the O. & C. road from Corvallis to the latter place without reference to said act.

PETITION for instructions under the Hoult act. The opinion states the facts.

John W. Whalley, for the receiver.

Wallis Nash, for the Oregon Pacific.

DEADY, J. By section 4 of the act of February 20, 1885, it is declared unlawful for any person engaged in the transportation of property by railway in this state to charge or receive any greater compensation for a short haul than a longer one in the same direction: Sess. L., 39.

On April 23, Mr. Koehler, the receiver of the road of the Oregon and California railway company, presented a petition to this court, asking for instructions concerning his right and duty, as such receiver, under the provisions of said act, whereupon said receiver was instructed, among other things, as follows: "To charge no more for the transportation of goods than the maximum allowed by the act, nor no more for a short haul than a long one in the same direction, except to and from points where the rate obtainable is affected by water transportation, in which case he may carry at as low a rate as the water craft do, without reference to the length of the haul:" 6 West Coast Rep., 345.

And now said receiver asks for further instructions under said section 4 on a state of facts which have arisen since that date. From the present petition it appears that the Oregon Pacific railway company has lately completed a road from Yaquina bay to Corvallis,

and is now engaged in the transportation of freight and passengers thereon between said points; that in connection therewith an ocean steamer is run between Yaquina bay and San Francisco, "thus forming a line of transportation from Corvallis, in the center of the Wallamet valley, to San Francisco," making Corvallis a competing point for railway and ocean transportation of goods exported from or imported into the state; and that this fact necessarily affects the rate of transportation obtainable at other points, capable of being reached by water craft from Corvallis.

By leave of the court, the counsel for the Oregon Pacific was heard on the petition in opposition to counsel for the receiver.

It does not appear, as distinctly from the petition as it should, but it was admitted on the argument by counsel, that the Oregon Pacific is carrying wheat from Corvallis to Yaquina bay, a distance of seventy-two miles, for two dollars and sixty cents per ton, from whence it is carried by steamer to San Francisco for one dollar and ninety cents per ton, or four dollars and fifty cents over the whole route; while the receiver is carrying it on the road of the Oregon and California company, from Corvallis to Portland, a distance of ninety-eight miles, for three dollars and twenty cents a ton, from whence it is carried by steamer to San Francisco for two dollars and fifty cents per ton, or five dollars and seventy cents over the whole route. From this, it appears, that there is in fact a competition between these two roads, at Corvallis, for the transportation of Oregon wheat, destined to San Francisco, the one being an important part of the route via Yaquina bay and the other via the Columbia river.

The ocean and railway transportation via Yaquina bay appear to be under one management, and are probably one in interest. The water transportation via the Columbia river route is merely a connecting link with the Oregon and California road, and the management and ownership of each is separate and distinct from that of the other.

It follows that the managers of the Yaquina bay route, by making a rate to San Francisco, less than the one by the Columbia river, whether the reduction be on the railway or ocean part of such route, or both, may prevent the Oregon and California road from carrying any wheat from Corvallis, that is destined to San Francisco, unless the latter is allowed to compete for the same by making a rate between Corvallis and Portland, which will at least equalize the cost of transportation by the two routes.

Of course, the Oregon Pacific has no right to object to this, and the public, who are interested in or dependent upon Corvallis as a shipping point for the export of wheat, cannot be injured by it, but may be benefited.

The only objection that can be made to this reduction of rate from Corvallis to Portland is that it would be in conflict with the provision of the "Hoult act," concerning short and long hauls, un-

less the rate is correspondingly reduced at all points between these two places, which is not intended.

In *Ex parte* Koehler, *supra*, I held that, while the state had "the power to prevent a railway from discriminating between persons and places, for the sake of putting one up and another down, or for any reason other than the real exigencies of its business," it could not prevent discrimination between places, when it is the "result of competition with other lines or means of transportation," and practically thereby deprive a railway company of the right to do business and render its property comparatively valueless.

This ruling governs this case. The Oregon Pacific, by means of its connection with the ocean steamer between Yaquina and San Francisco, is competing at Corvallis with the Oregon and California road for the carrying of wheat to San Francisco, and the receiver of the latter must be allowed to make a rate between Corvallis and Portland that will enable it to secure what it can of the business.

The receiver also asks for instructions under the proviso in section 2 of the act, which reads as follows: "The provisions of this act shall not apply to goods intended in good faith to be shipped to points beyond the limits of this state."

At the passage of this act there was no railway running out of the state except that of the O. R. & N. company. And such is still the case. The only reason on which the proviso could have been adopted, is, that in the carriage of goods out of and beyond the state, no injury or inconvenience can result to places within it, by reason of a less rate for a long haul than a short one in the same direction. Besides, the transportation of goods to a point without the state is inter-state commerce, and beyond the power of the state to regulate. And it can make no difference in principle or result, that the goods so shipped are carried over different lines of transportation within the state before passing beyond its limits. It is the intent or purpose of the shipper concerning the destination of the goods at the time of shipment that determines the question whether they are within the exception or not. Whether the road upon which they are first placed is an inter-state one or not is immaterial. Any road which leads beyond the limits of the state or forms a link in a line of extra-state transportation, upon which goods are shipped with intent to transport them beyond the limits of the state, is so far exempt by the proviso from the operation of the act: Pacific Coast S. S. Co. v. R. R. Commissioners, 9 Saw., 253; Daniel v. Ball, 10 Wall., 557.

The question in each case is one of fact, and must be determined by its own circumstances.

The receiver is therefore instructed that in hauling wheat or other property from Corvallis or other points on his road that is en route for San Francisco or other point beyond the limits of the state, he may make a rate therefor without reference to the act.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

IN RE JUNG AH LUNG, ON HABEAS CORPUS.
IN RE JUNG AH HON, ON HABEAS CORPUS.

October 13, 1885.

CHINESE RESTRICTION ACT—CHINESE DENIED RIGHT TO LAND—HABEAS CORPUS.—A Chinese person, on board of a vessel recently arrived at the port of San Francisco, from which he is not permitted to land, is restrained of his liberty within the meaning of the *habeas corpus* act, and is entitled to have the lawfulness of such restraint inquired into and determined on *habeas corpus*.

THE SAME—COURT NOT BOUND BY DETERMINATION OF COLLECTOR.—The fact that the collector of the port, acting under the directions of section 9 of the Chinese restriction act of 1882, has already investigated and passed upon the petitioners' right to land, does not deprive the court of jurisdiction to determine whether such restraint is lawful.

In these cases the United States attorney proposed to raise for final submission to the supreme court, if necessary, two important points relative to the jurisdiction of the court in *habeas corpus* cases under the restriction act. After moving for and obtaining, by consent of the counsel for the petitioner, various formal orders necessary to enable him to raise and submit to the court the points proposed, he asked and obtained leave to file an amended intervention containing objections to the jurisdiction of the court. To this intervention and plea the counsel for the petitioners interposed a demurrer, as the proceeding was *quasi* amicable, and as the pleadings had been prepared with the knowledge of both parties, and after full conference by counsel on both sides with the judge the reading of the pleadings was dispensed with and the cause submitted.

Wm. F. Gibson, for the petitioners.

S. G. Hilborn, U. S. Attorney, contra.

HOFFMAN, D. J., in rendering an oral decision, said:

The intervention filed by the district attorney challenges the jurisdiction of the court upon two grounds.

First—That the petitioner is not restrained of his liberty within the meaning of the *habeas corpus* act.

Second—That the collector has already investigated and passed upon the petitioner's right to land. That the question is, therefore, *res adjudicata*, and that the court is bound by the collector's decision and has no right to further examine into the matter.

First—It is admitted that the petitioner is of the Mongolian race; that he is on board a steamer recently arrived at this port, from which he is not permitted to land. The mode of his restraint is not specified, but if restrained lawfully any force necessary to prevent his leaving the ship can rightfully be applied.

It is not denied that it is the intention of the master to retain him on board the ship until her departure, and then to convey him to the port in China, from which he came, unless, in the meantime, the petitioner may find means of getting on board some other ship with-

out landing on our shores, to be conveyed, by her, to some foreign country.

Whether this proceeding be lawful, may involve important questions of law and of fact. The petitioner is a free man under our flag, and within the protection of our laws. If the denial therefore to the petitioner of the right to land, thus converting the ship into his prison house, to be followed by his deportation across the sea to a foreign country, be not a restraint of his liberty, within the meaning of the *habeas corpus* act, it is not easy to conceive any case that would fall within its provisions.

The second objection raised by the district attorney, is that the restriction act commits to the collector the duty of deciding upon the right to land of any Chinese person arriving in this country; that his decision is final and conclusive, and that this court has no right to review it on the return of the writ of *habeas corpus*.

This claim of exclusive jurisdiction on the part of the collector must be derived from the provisions of the ninth section of the act of 1882, for no other section of the act affords the slightest color to such a pretension.

Section 9 is as follows: "Before any Chinese passengers are landed from any such vessel the collector, or his deputy, shall proceed to examine such passengers, comparing the certificates with the list, and with the passenger, and no person shall be allowed to land in the United States from such vessel in violation of law."

It will be perceived that the duty imposed upon the collector is to make the examination mentioned in the section. He is not, in terms, directed to prevent the landing of passengers, but it may reasonably be inferred, from the clause which forbids any passengers to be landed in violation of the law that it was intended that he should carry out that provision. But the section affords no color to the extraordinary pretension that the result of that examination shall be final and conclusive upon the rights of passengers. Such an abrogation of the writ of *habeas corpus*, which has always been considered amongst English-speaking peoples the most sacred muniment of personal freedom, must be unmistakably declared by congress before any court could venture to withhold its benefits from any human being, no matter what his race or color. It seems to have been in some quarters overlooked, that the restriction act does not prohibit the coming into this country of all Chinese persons.

First—The restriction is, both by the treaty and the act of congress, confined to Chinese laborers, and persons other than Chinese laborers are not prohibited from landing.

The passenger arriving here, may be a Chinese merchant, student, traveler from curiosity, or other person not a laborer. The inquiry into his status in this respect is often exceedingly difficult.

Second—He may also hold a certificate issued by the custom house authorizing him to re-enter the United States. The question whether such certificate has been fraudulently obtained, and whether

the person holding it is entitled to its protection, is frequently raised, and often very difficult of solution.

Third—He may also, under the decision of the supreme court, be entitled to land without a certificate if it shall appear that he resided in the United States at the date of the treaty and departed therefrom, before the restriction act went into operation and before it was possible for him to obtain a return certificate from the custom house. This inquiry also is exceedingly difficult.

Fourth—He may be entitled to land on the ground that he was born in this country, and has therefore the full rights of an American citizen.

Here, also, difficult questions of fact may arise for determination. The collector, who, it is suggested, is charged with the exclusive decision of these questions, is not of necessity a lawyer. He discharges his duties by deputy. He is not authorized to administer oaths to witnesses, nor to compel their attendance. The discharge by him of the duties, heretofore supposed to belong to the judicial department of the government, would be almost impracticable, unless the other duties of his office be neglected. It is believed that in this class of cases the collector has rarely personally concerned himself with their examination. If I am right in the opinion that a Chinese person, like every other human being in this country, is entitled to the benefits of the writ of *habeas corpus*, in order that it may be judicially ascertained whether the restraint of his liberty be lawful or unlawful, to require the court in its investigation to be governed by the decision of an executive officer, acting under instructions from the head of the department at Washington, would be an anomaly wholly without precedent, if not a flagrant absurdity.

The right to a writ of *habeas corpus* is the right to have the lawfulness of the restraint to which the petitioner is subjected inquired into by the courts, to be adjudged and determined by the law of the land. It has not as yet been committed to any purely executive officer. I am, therefore, clearly of the opinion that it is the duty of the "court, justice or judge to whom such application (for a writ of *habeas corpus*) is made, to forthwith award writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto:" R. S., section 755.

The performance of this duty the court is not at liberty, on any pretext, to evade.

That on the return of the writ it is the duty of the court to inquire and determine whether the restraint is lawful, independently of any previous decision of the question by the collector or his deputy, or by the surveyor, or by the inspector of customs stationed on board the vessel.

If the position taken in the intervention of the United States attorney be sound an extraordinary circumstance must be noted. The restriction act has now been in operation for nearly three years and a half, and numerous cases on the return of the writs of *habeas*

corpus issued on the application of Chinese persons had been presented to Mr. Justice Field, to Judge Sawyer, circuit judge, and the district judges of Washington territory, Oregon, Nevada and California.

Similar cases have also arisen in the federal courts in Boston, New York and Philadelphia, and on appeal have been decided by the supreme court of the United States.

It has never been suggested by any judge or district attorney that the refusal to allow a Chinese passenger to land was not a restraint of his liberty, the lawfulness of which was to be inquired into by the courts, nor has the still more extraordinary pretension until now been set up that in such inquiry the court, whether the supreme court of the United States, the circuit court or the district court, was to be controlled by the decision rendered by the collector of the port or his deputy.

The demurrer to the intervention is sustained, and the district attorney is allowed to file an intervention contesting the merits of the application.

SUPREME COURT OF ARIZONA.

CULLUM *v.* PAUL.

Filed September 3, 1885.

ASSIGNEE FOR BENEFIT OF CREDITORS—MAY SUE IN OWN NAME.—An assignee for the benefit of creditors can maintain an action, in his own name, to recover possession of the property assigned; he is not required to sue as assignee.

ASSENT OF CREDITORS PRESUMED TO ASSIGNMENT.—In the absence of evidence of dissent, the assent of creditors is presumed to a general voluntary assignment for their benefit, without preference or restrictions

A FINDING THAT A PERSON WAS INSOLVENT, presupposes that he has creditors.

THE FINDINGS OF THE LOWER COURT WILL NOT BE REVIEWED on appeal, unless there was a motion for a new trial.

STATEMENT ON APPEAL—MUST CONTAIN ALL OF EVIDENCE.—When the statement on appeal does not purport to contain all the evidence, the appellate court will not consider an objection that the findings are not sustained by the evidence.

A MERE CLERICAL ERROR IN THE AMOUNT OF THE JUDGMENT as entered, will not warrant a reversal.

APPEAL from the judgment of the district court of Pima county entered in favor of the plaintiff.

Ben Morgan, for the appellant.

Earll & Campbell, for the respondent.

HOWARD, C. J. This is an action brought by plaintiff to recover from the defendant the possession of certain goods, wares and merchandise alleged to have been wrongfully taken by defendant from plaintiff, or for the sum of thirty-five thousand dollars, the alleged value thereof in case delivery cannot be had.

The answer contains denials of the allegations of the complaint, and a further and separate answer and defense alleging that defendant, as sheriff of Pima county, had seized and taken possession of the goods, etc., under an attachment issued from the district court of Pima county in the case of G. Howard Thompson v. Lord & Williams, further alleging that goods, etc., were at the time of seizure in possession of, and the property of Lord & Williams. The case was tried by the court without a jury.

The court found substantially that on the twenty-fifth day of October, 1881, the goods, etc., in question were the property of the firm of Lord & Williams Company, composed of C. H. Lord, W. W. Williams and C. E. Harlow, and that on that day said firm made a general assignment of all their property, not exempt from execution, to plaintiff for the equal benefit of all their creditors, and plaintiff accepted said assignment and received said goods, etc., from said firm and took possession thereof, and that said assignment was made in good faith. That defendant, as sheriff of Pima county, on the twenty-eighth day of October, 1881, seized and took said goods, etc., from the possession of plaintiff, under an attachment that day issued from the district court of Pima county, in the case of G. Howard Thompson v. Lord & Williams. That said property, when so seized and attached, was the property of plaintiff,

and not subject to such seizure or attachment, and that the value thereof was thirty-five thousand dollars.

The court found as conclusions of law, substantially, that the said goods, etc., were wrongfully taken and detained by the defendant from the possession of plaintiff, and that plaintiff was entitled to a judgment for the return of said property, and if the same cannot be made, for the sum of thirty-five thousand dollars against defendant. A judgment was entered upon their finding in the following words.

"The court having this day signed and filed its findings of fact and conclusions of law in this case, and the value of the property claimed having been found by the court to be the sum of thirty-*nine* thousand dollars, and the property claimed having been taken into possession of the plaintiff; therefore it is adjudged that the plaintiff, have and retain possession of the personal property described in the complaint with the costs, etc."

The case is brought up on appeal from the *judgment alone.*

There was no statement on motion for a new trial. The record contains the judgment roll, a statement on appeal, signed by the attorneys for plaintiff and defendant, and defendant's specification of errors.

The statement on appeal sets out evidence given at the trial without purporting to contain all the evidence given at the trial. We will now proceed to notice defendant's specification of errors.

1. "The court erred in refusing to sustain the objection made by defendant to the introduction of the power of attorney offered by the plaintiff." There is nothing in the record showing this to have been error. The power of attorney was duly authenticated, and was pertinent, and was part of plaintiff's evidence of title.

2. "The court erred in permitting the articles of agreement of the partnership between Lord & Williams Company to be read in evidence against defendant's objection." The record shows no evidence that this was error. The agreement was a part of plaintiff's evidence of title, and was duly proved.

3. "The court erred in admitting in evidence the assignment made by Lord & Williams Company to plaintiff Cullen against defendant's objection." The assignment was a part of plaintiff's evidence of title and was duly proved.

4. "The court erred in refusing to grant the motion made by defendant to strike out the testimony introduced by plaintiff in the case, on the ground of variance between it and the allegations of the complaint."

5. "The court erred in refusing to pass upon and grant defendant's motion for a nonsuit made on the conclusion of plaintiff's case, on the ground that the plaintiff had failed to make out his cause of action, as alleged in his complaint."

The record shows that these two specifications of error, as well as the first three, were based on an assumption by defendant that because plaintiff, in his complaint, had sued simply in his individual

capacity, without showing his character as assignee, that, therefore, he should not be permitted to give in evidence the several instruments, going to show title vested in him as assignee. The question raised is, whether this assignee, after he has taken possession of the personal property conveyed to him by the deed of assignment, and has been wrongfully deprived thereof, by a third party, can sue in his personal capacity to recover possession of the property, or whether he is bound to sue in his representative capacity. The authorities leave no doubt on this question. It is expressly held in Hoagland v. Trask, 48 N. Y., 686, and Ogden v. Prentice, 33 Barb., 160, that an assignee may sue either in his personal or representative capacity. It is a familiar rule, that an executor or administrator, after he has reduced the goods of the estate to his possession, and has then been wrongfully deprived of them, may sue for the recovery thereof in his individual capacity. It is clear that the record shows no such errors as are claimed in iv. and v. specifications of error.

6. "The defendant assigns as further ground of error the insufficiency of said findings to warrant or support the judgment in favor of plaintiff, on the ground that said findings show that the plaintiff, H. B. Cullum, held said property by virtue of the assignment of Lord & Williams Company, and as trustee, for the purpose of paying the creditors of said firm.

"That at the time of the levying of the attachment in the case of Thompson v. Lord & Williams, by the defendant herein, by virtue of which he took possession of said goods, etc., no creditor of said firm had assented to said assignment, or become a party thereto in any way."

It is a sufficient answer to this specification of error to say that the findings *nowhere show* that, at the time of the levy of the attachment, "no creditor of the firm had assented to said assignment, or become a party thereto in any way."

We will add, however, that in the case of a general voluntary assignment for the benefit of creditors, without preference, and without restrictions, as the record shows this to have been, in the absence of proof of dissent, the law presumes the assent of the creditors to the assignment for their benefit: America Leading Cases, page 72; Nicoll v. Mumford, 4 Johns., 523-529.

7 "Also that there is no evidence that at the time of making of the said assignment there were any creditors of Lord & Williams Company for whose benefit said assignment was made, and said Cullum claimed to hold said property."

If this specification means that the findings show there was "no evidence," and to entitle it to the consideration of this court, it must mean that, then a sufficient answer to it is, that the findings show no such thing, but, on the contrary, it is shown by the first finding that, at the time of making the assignment, the firm of Lord & Williams Company were *insolvent*, a condition that presupposes creditors.

The specification of errors then proceeds as follows: "The defendant, further, shows the insufficiency of the evidence to justify the findings of facts and conclusions of law upon the following grounds," and then elaborately sets out fifteen distinct grounds. This specification and the grounds therefor, cannot be considered by this court. The record shows no statement on motion for new trial, and no motion for new trial. This is an attempt to review the findings of the court without a motion for a new trial. The findings of the court below will not be reviewed on appeal, unless there was a motion for new trial: Frederico v. Hancock, 1 Arizona R., 512.

In Gagliardo v. Hobertin *et al.*, 18 Cal., 395, the defendant *brought up all* the evidence, but made no motion for a new trial. The court say: "In this case, no motion having been made for a new trial, the findings of the court are conclusive as to facts."

Mr. Justice Field, in Duff v. Fisher, 15 Cal., 880, says: "In this state the statute provides the manner in which the verdict of a jury, upon an issue submitted to its decision, may be reviewed. It is only by a *motion for a new trial.*"

The statutes of California and Arizona are identical on this subject, and findings by the court stand on the same footing as the verdict of the jury.

Though this doctrine is firmly established by an unbroken line of decisions in California, construing a statute identical with our own, yet, as the whole doctrine is so ably and fully set forth by the supreme court of California in Reed v. Bernard, 40 Cal., 628, that we will quote at length from that decision. The court say, page 630, *et seq.:*

"When a party complains that the evidence was insufficient to justify a verdict or decision, the appropriate remedy is by motion for a new trial; and, in pursuing this remedy, the statute requires him to specify in his *statement in support* of the motion, the particulars in which the *evidence* was insufficient. In this method the attention of the court and counsel is particularly *directed* to the precise point in which the evidence is alleged to be insufficient, so that on the *trial of the motion* the court may review the evidence and exercise its judgment and discretion, either by upholding or setting aside the verdict or decision. It is conceded on all sides that if there be any evidence whatever tending to support the verdict or decision, its sufficiency can only be determined, and the evidence reviewed for that purpose on a motion for new trial, and we have repeatedly held that if there be a substantial conflict in the evidence, this court will not disturb the verdict or findings. It is equally well settled that if there be no findings in a case tried by the court, without a jury, and no proper exceptions for want of findings, a presumption arises that the court found all the facts necessary to support the judgment. If there be no actual findings the law implies findings sufficient to sustain the judgment. *In all* cases, therefore, whether there be a verdict or written findings or only the findings which the law implies in support of the judgment, if it be claimed that there was no evidence

whatever to support the judgment, this is only another mode of saying that the evidence was insufficient to justify the verdict or findings, as the case may be. If the verdict or written findings support the judgment, it is too plain to admit of discussion that so long as the verdict or written findings remain undisturbed, the judgment cannot be assailed on the ground that it is not justified by the evidence. Before the judgment can be attacked on this ground, the verdict or findings must be set aside because not justified by the evidence, and this can only be done on motion for a new trial."

Such is the law of California and Arizona, and it is decisive of this case. The findings of the court in this case clearly warrant, and support, the judgment, and in the absence of a motion for a new trial these findings are conclusive and binding upon this court.

There is another serious obstacle in the way of defendant in his attack upon the findings of fact and conclusions of law. It is, that the statement on appeal does not purport to contain all the evidence and in examining the whole record it is evident that it does not.

"When the statement on appeal does not purport to contain all the evidence, the appellate court will not consider an objection that the verdict is not sustained by the evidence:" Moore v. Tice, 22 Cal., 515.

It will be seen by the judgment copied into this opinion that in its recital, it states that it was found by the court the value of the property was thirty-*nine* thousand dollars, whereas the findings show that the value was thirty-five thousand dollars. This is evidently a clerical mistake in the party who drafted the judgment. The judgment shows that the property was in the possession of the plaintiff, and this error in the recital of the judgment can be of no possible damage to defendant. If any one could be be damaged by this error it would be the plaintiff, as the judgment shows that he is in possession of the property, and he and his sureties are responsible for its value.

The judgment of the court below for thirty-five thousand dollars, costs, etc., is affirmed.

PINNEY, J., concurred.

FITZGERALD, J., having presided at trial in court below, took no part in this case on appeal.

SUPREME COURT OF NEVADA.

STATE, EX REL ATTORNEY GENERAL, v. HORTON ET AL.

Filed October 12, 1885.

ELECTION FOR SCHOOL TRUSTEES—JUDGE OF, CANNOT ADMINISTER OFFICIAL OATH.—A judge of an election for school trustees has no power to administer the official oath of office to the elected school trustees. The only oath which he can administer is the one prescribed in the statute of 1885, section 9, to a voter when challenged.

THE SAME—OFFICIAL OATH MAY BE ATTACHED TO CERTIFICATE OF APPOINTMENT.—A statute requiring the official oath of a public officer to be endorsed on his certificate of appointment, is sufficiently complied with if such oath be attached to the certificate.

APPLICATION for *quo warranto*. The opinion states the facts.

R. M. Clarke and *J. D. Torreyson*, for the relator.

A. C. Ellis, for the respondents.

HAWLEY, J. This is a proceeding in the nature of a *quo warranto*, to determine whether the respondents have wrongfully and unlawfully introduced themselves into, and usurped, the offices of school trustees of Empire school district in Ormsby county.

The material facts, as presented by the pleadings and proofs, are that the number of census children in Empire school district is less than four hundred; that at the general election in November, 1882, W. J. Smyth was elected school trustee in said district for the term of four years from and after January 1, 1883; that at the general election, in 1884, J. P. Woodbury and John Christiansen were elected trustees; the former for a term of four years, and the latter for two years; that said parties qualified by taking the regular oath of office before an officer authorized to administer oaths, and that their oaths of office were endorsed upon their certificates of election; that on the second Saturday of May, 1885, at an election held, pursuant to the provisions of the supplemental school act, approved March 12, 1885: Stat. 1885, 111; the respondents, Horace A. Bowley, George Horton and A. D. Smith, were elected school trustees in said district for the respective terms of one, two and three years from the first day of September, A. D. 1885; that they received their certificates of election, on the ninth of May, and the oath of office was administered to them by one of the judges of the school election; that on the third day of September, A. D. 1885, S. H. Wright, county superintendent of schools in Ormsby county, believing that a vacancy existed, appointed J. P. Woodbury, W. J. Smyth and John Christiansen, school trustees of said school district; that on the fifth of September, 1885, W. J. Smyth and John Christiansen signed and subscribed the official oath, and it was sworn to before a justice of the peace; that on the twelfth day of September, 1885, J. P. Woodbury qualified by taking the official oath before a notary public; that the respective oaths of office were attached to their certificates of appointment; that, subsequently, on the twenty-first of September, 1885, after the information in this case had been filed with the clerk of this court, Horace A. Bowley and A. D. Smith went before

a notary public and had the official oath administered to them and annexed to a paper containing what purported to be a copy of their certificates of election.

Counsel for the respective parties discussed the question of the construction and constitutionality of the supplemental school act; but it is unnecessary for us to consider either of these questions in deciding this case. The judges of the election had no authority to administer the official oath of office to the elected school trustees. The only oath which a judge of election could administer is the one prescribed in the statute, to a voter when challenged: Stat. 1885, 113, sec. 9.

If the supplemental school act is unconstitutional, the respondents would have no right whatever to the offices of school trustees, and Woodbury, Smyth and Christiansen would be entitled to the offices by virtue of their election and qualification under the old law. If the supplemental act is constitutional, respondents would not be benefited thereby, because they failed to qualify as required by law, and Woodbury, Smyth and Christiansen would be entitled to the offices by virtue of their appointment. The question whether S. H. Wright qualified, as superintendent of schools, according to the provisions of the statute, cannot be inquired into in this proceeding. It was enough to show that he was elected and entered upon the duties of this office, and that he has ever since been exercising the duties thereof.

The objections made to the effect that the official oaths of Woodbury, Smyth and Christiansen were attached to, instead of being endorsed upon the back of, their certificates of appointment, or endorsed on the face, instead of the back, of their certificates of election, are without merit: Brown v. Foster, 2 Met., 155.

The respondents having failed to show any legal right to the offices of school trustees, a judgment of ouster must be entered against them, with costs. It is so ordered.

LEONARD, J., concurring. I concur in the judgment.

SUPREME COURT OF CALIFORNIA.

HIRSCHFELD v. SUPERIOR COURT OF TULARE COUNTY.

Department Two. Filed October 14, 1885.

SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS—WRIT OF REVIEW.—Where an order settling the first annual account of an administrator has been made, a subsequent order that such account should be again gone into in connection with the administrator's second annual account, cannot be reviewed on a writ of review.

AFTER a first annual account, filed by petitioner, as administrator of an estate, was settled, a second annual account was presented, and the court ordered, in substance, that the first account should be again gone into in connection with the second. To review this order the present proceeding was brought.

Wul. J. Tuska, for the petitioner.

THE COURT. Petition for writ of review. The case, as presented by the petition, does not involve any question of jurisdiction in the court below; therefore the petition is denied.

No. 11,178.

HORTON v. DOMINGUEZ.

Department Two. Filed October 14, 1885.

TRANSCRIPT ON APPEAL—TIME FOR FILING.—A transcript on appeal, filed on August 5, 1885, is filed within the time limited by rule 2 of the supreme court, when the notice of appeal was filed on June 3, the bill of exceptions settled on July 1, and filed on July 2.

MOTION to dismiss an appeal from the superior court of Ventura county. The notice of appeal was filed on June 3, 1885. The bill of exceptions was settled on July 1, 1885, and filed on July 2. The transcript was filed on August 5, 1885.

Hall & Hamer, for the appellant.

Blackstock & Shepherd, for the respondents.

THE COURT. The transcript was filed within the time prescribed by rule 2 of this court. The motion to dismiss the appeal is therefore denied.

No. 11,016.

LUCO v. COMMERCIAL BANK OF SAN DIEGO.

Department Two. Filed October 14, 1885.

APPEAL—NOTICE OF MUST BE SERVED ON ALL ADVERSE PARTIES—PARTITION.—An appeal from an interlocutory decree in partition will be dismissed, if the notice thereof was not served upon all of the adverse parties.

MOTION to dismiss an appeal from the superior court of San Diego county. The opinion states the facts.

A. B. Hotchkiss, for the appellant.

Levi Chase, W. J. Hunsaker and *Thomas J. Arnold*, for the respondents.

THE COURT. A motion is made to dismiss the appeal, which is from an interlocutory decree in partition, on the ground that the notice of appeal was not served on all of the adverse parties. As the notice was not so served, the motion must be granted. Ordered accordingly.

WEST COAST REPORTER.

WHOLE NO. 96. OCTOBER 29, 1885. VOL. VII. NO. 16.

CIRCUIT COURT, DISTRICT OF OREGON.

THE QUEEN OF THE PACIFIC, HER CARGO, ETC.
THE PACIFIC COAST STEAMSHIP COMPANY, CLAIMANT.
GEORGE FLAVEL ET AL., LIBELLANTS. J. H. D. GRAY ET AL., INTERVENORS.

October 9, 1885.

ADMIRALTY — SALVAGE SERVICES — COMPENSATION FOR.—The pleadings of the district court reviewed and held supported by the evidence; and the decree of the district court affirmed.

ADMIRALTY. The opinion of the district court is reported in 3 West Coast Rep., 722.

Milton Andros, advocate for the claimant.

M. W. Fechheimer, advocate for the libellants.

C. E. S. Wood, advocate for the intervenors Gray, *et al.*

SAWYER, CIRCUIT JUDGE. At the last moment, the able advocate for the claimant filed a luminous and exhaustive brief, in which the evidence in the entire case is examined with great critical and analytical ability. This was not, as I have been informed, furnished to either the advocate for the libellants or the advocate for the intervenors. However, I should certainly have sent for the opposing counsel in the case, if I had thought it necessary to be enlightened by them upon any of the points raised in this brief.

I have myself taken it, and examined every question discussed in it, and could not but feel impressed with the care and labor bestowed upon it, and with the fact that nothing had been omitted that legal ability and searching analysis could present.

I have carefully examined all the maps and exhibits, and the testimony in the case, going over much of it several times, and I have arrived at clear conclusions as to every disputed point, which I will now proceed to announce. In giving my decision, I shall follow the order laid down in the brief just referred to, that of the claimant, which, in turn, has followed the order of the findings of fact in the decree made by the district judge.

First—That the services performed by the libellants and intervenors to the Queen of the Pacific, her tackle, apparel, furniture, appurtenances and cargo, on the fourth and fifth days of September, 1883, were salvage services. This finding is admitted.

Second—The diameter of the wheel of the Queen of the Pacific is sixteen feet, the hub of her propeller is three feet in diameter, and the center of the hub is nine feet above the keel line. This finding is admitted.

Third—At low water, the hub of the propeller, when not covered by the swell, was clearly visible, and there was not more than eight feet of water under the stern of the stranded vessel at low tide when she was aground.

This is the first finding that is challenged. I shall not go into the evidence upon this head. I have carefully examined it, and am satisfied the finding is fully sustained by it.

Captain Harris' testimony bearing upon this point, I attach some weight to. He is a man of experience, master of the life saving station at Cape Disappointment, and totally disinterested.

I think the finding is fully borne out by the testimony, and I affirm this portion of the decree of the district court.

Fourth. That the vessel and her cargo were in imminent peril of destruction at the time the services were rendered, and that said vessel and her cargo would probably never have been saved without the aid furnished by libellants and intervenors. This finding is also challenged, and is examined in the claimant's brief as follows:

1. Whether the vessel was in imminent peril of destruction at the time the services were rendered.

2. Whether it be probable that the ship and her cargo would never have been saved but for the aid furnished *a* by the libellants, *b* by the intervenors.

3. If it be probable that without the aid of the libellants and intervenors the ship would have been lost, then the degree of such probability.

This is, perhaps, the most important finding in the case, and the amount of property at stake is so large, reaching nearly to a million of dollars, that it must be a controlling element in fixing the award, and I have given to this point what I believe to be careful and conscientious consideration. The word imminent, conveys usually some idea of "immediate" or "upon the instant," but this does not mean an instant consummation. That the Queen was in a position of extreme peril, is admitted. That if she had not been rescued at the time she was, in all probability, she never would have been, is also admitted. But we do not need these admissions. We know from the history of those sands, and the wrecks upon them, from the natural laws of the ocean, and from all the testimony in the case, that the situation was one of the greatest menace, calling for prompt action and constant attention, and that anything like a storm would have inevitably destroyed the ship. Therefore, I think it can be said with entire truth, that the danger was imminent during the entire time she was on the sand.

In the opinion of all the witnesses familiar with Clatsop spit, her position was one of imminent danger. Captain Flavel's son said that he did not think she could be saved. I am also inclined to attach

some weight to the testimony of Captain Barry, who has been a resident for some years at Astoria, and acting then as the agent for Lloyds, and whose opinion was "that unless there was a series of very fortunate circumstances and good management, the Queen would not come off."

Now as to whether the ship would have probably been lost, but for the efforts of the salvors. It is in evidence, and admitted, that immediately after the steamship grounded the engines were reversed and kept backing with full force without avail; and that she went on and came off at about the same stage of the tide is likewise admitted. Now all that the steamship had acquired in addition to her propeller was the anchor sent out during the night by means furnished by the intervenor Gray. Meanwhile she had lain twenty-four hours on the sands, and it had bedded about her, burying her propeller blades so deeply that the engineer found great difficulty in working her engines past the center.

To this cable attached to the anchor, which anchor was very soon deeply bedded and never came home at all, was applied the fourfold purchase before spoken of, which would multiply the power of the capstan engine four times, less friction and stiffness of cordage. There was also the leverage of the capstan, which is not precisely known. I have no doubt this anchor held the ship from going further on the sands, but we have seen that with the capstan and the main engines in full play, and the tide being at its height, the ship failed to come off. It is in evidence that she moved, but I do not trust that evidence, it does not satisfy my mind.

It was certainly very difficult to determine by the means employed, that the ship had moved the short distance of nine feet, as testified to by third officer Wheeler, the only officer who speaks with any degree of certainty, but to whose testimony I do not attach much importance, for he subsequently testified that she moved five hundred and forty inches, which statement he, upon the following day, corrected and modified to one hundred and eight inches. In the first place, Captain Alexander, who, of all on the ship, ought to have known, is very careful not to say that she moved, he will only say, "it was the general impression that she moved that night." Captain Harris of the life saving station, a disinterested witness, and one upon whose testimony I feel disposed to rely, says that he tied a rope yarn about the hawser and it carried through the hawse pipe about nine feet, but this would only indicate that the ship moved, or the anchor came home, or the hawser stretched. In another place Captain Harris states positively that he does not think the ship moved, and on carefully examining his testimony, I have concluded this to be his real opinion, and what he meant to indicate about the piece of twine was that the hawser stretched about nine feet. But suppose she had moved, if she stopped at all it must have been by some resistance greater than that she was overcoming, and to stop a ship of her size when once in motion, no trifling sand

bank would suffice, so that truly we could say, the last condition of this ship was worse than the first.

My own conclusion is that the ship did not move at all.

Again: It is said in behalf of the theory that the Queen contributed materially to her own relief; that Captain Alexander called out to the engineer to give her all the steam she would stand, to throw the throttle wide open, or something of the kind. Now, according to the engineer's testimony, the whole machinery of the vessel had been working up to its full capacity for half an hour before she came off, so that, whatever Captain Alexander may have intended, it is evident his words had no effect. I think it is clear, from the evidence, that after the tugs swung round to their second position (the main and the capstan engines being in full play) there was a long pull, a strong pull and a pull all together, which had the happy result of releasing the ship, just which, if any, of these forces could have been dispensed with, is a matter that cannot be known; but, in my opinion, they were all necessary and all contributed; and I have no doubt at all that the vessel would never have gotten off if it had not been for the efforts of the salvors, libellants and intervenors. It was, as I say, a long pull, a strong pull, and a pull all together, that released the ship. I think this finding of the district judge is couched in very moderate language. To me it seems he would have been justified in using stronger terms, perhaps, in saying that but for the salvors her loss would have been inevitable. I do not think it necessary to occupy more time in reviewing the evidence and presenting my reasons further upon this head. The finding of the district court is affirmed. One other point I had in mind to notice in this connection; that is, that in order to depreciate the services of Captain Flavel and his tugs the claimant finds it necessary to give full credit to the efficiency of this anchor carried out by the means furnished by Gray, the scow and the tug Canby, and in seeking to deprive Gray of this benefit as a salvor the counsel for the claimant suggests in his brief means by which the ship without other aid could have accomplished the same purpose, but none of this is in evidence, and what might have been done is wholly conjectural, all that is certain is that Captain Gray, either from experience in such matters or by a happy inspiration of the moment, grasped the fact that the Queen had no means for carrying out her heavy anchors and that his scow would afford a ready and certain way of approaching her, and did so, and that the means provided by him were used with great benefit to the ship, and that until the arrival of the scow the planting of an anchor had not been discussed, so far as we know. That Captain Gray remained by the distressed steamship until his services were no longer needed, and in the dark with his tug, assisted in carrying out this anchor, all of which shows that he is largely entitled to the credit of whatever benefit this anchor was to the ship.

Fifth—That the vessel went on and came off the spit, where she was aground, at high water "slack."

This finding is not challenged.

Sixth—That on the fourth of September, 1883, it was high water at the point where the vessel was aground at about forty-one minutes past one o'clock in the afternoon, and on the fifth of September, 1883, it was high water at the same point at about seven minutes past two in the afternoon.

This finding is not challenged.

Seventh—That the main engines of the vessel are three thousand horse power, and she has also a smaller engine of fifty horse power; that the highest capacity to which the main engines were ever worked during the time she was stranded was about two thousand two hundred horse power, and that as soon as the vessel grounded her engines were reversed and worked to their full capacity, attempting to back her off, but without success; and that on the night of the fourth, at high tide, both her main and her small engines were worked to their full capacity for about two hours, in attempting to get the vessel off, but without success.

This finding is not challenged.

Eighth—That the engines of the stranded vessel had been working to their full capacity for about half an hour immediately prior to the time when the vessel came off the spit.

This finding is admitted.

Ninth—That the weather during the time the vessel was stranded was thick with fog and smoke, and the sea was comparatively smooth, with a swell thereon of about six feet.

This finding is challenged, but there is no contest upon it except as to the height of the swell, and I think the majority and weight of the evidence sustain the fining. It is affirmed.

Tenth—That on the night of the fourth of September, 1883, and at low tide, there were light breakers or tide-rips in the vicinity of the place where the vessel was aground.

This finding is challenged, but was, as I remember it, abandoned on the trial. Certainly, there is no dispute as to this point in the evidence, and this finding is affirmed.

Eleventh—That on the day following the rescue of the vessel, the weather and surf on the spit were such as would have made it very dangerous for the vessel if she had been there.

The finding is challenged, but exactly why, I don't understand, for the next finding, which is admitted, contains a corroboration of it. However, it is, in my opinion, fully sustained by the evidence, and is affirmed.

Twelfth—That if the vessel had not been rescued when she was, in all probability, she never would have been saved.

This finding is not challenged.

Thirteenth—That the libellants and intervenors displayed promptitude, energy, skill and good judgment throughout in the performance of the services rendered to the property libeled in this suit, and that the safety of such property was largely due to the efforts of the libellants and intervenors in that behalf.

This finding is challenged, but is discussed in claimant's brief in the third sub-division of the elements of salvage, and under the fourth finding of the decree. I do not think it necessary to add anything to what I have already said, further than to remark that I think it highly probable, if not certain, that a man of the large experience of Captain Flavel, over twenty-five years at the mouth of the Columbia river, and engaged in the steam tug business for towing and aiding vessels—would know more about the business in hand than any other person then present. At least he was left to his own devices, and at no time was he interfered with, or a suggestion made to him by those on the Queen.

Some fault has been found with him for hauling with the tugs on the port quarter of the Queen of the Pacific, and with his theory of "wiggling" her in her bed, and the opinion has been expressed that he ought to have pulled dead astern so as to drag her off in the way that she went on. Now, in the first place, she was a very large and heavy ship, and must have gone on to the banks or spit under full headway, for she was found well inside the twelve foot line and the line of breakers, and no efforts of her own gave her any relief. It is evident that loose, shifting sands of the character these are represented to be, would tend to bank about her midships, and it is in evidence that she had a considerable bank on her starboard side and it is more than probable there was one on her port also. These banks accumulated during the twenty-four hours that the Queen of the Pacific was on the spit and to have dragged her through them, she being wider amidships than aft, would have been in the nature of things very difficult; it does not need evidence to show that, on the other hand, if she could be moved ever so little in her bed, it would loosen the sand about her and allow the water to rush in and help clear it away; besides this bank or banks of sand closely impacted about the sides of the ship would exclude the water and its pressure and thus the buoyant effect would be lost of some portion of the water about her, so that it would require a greater depth to float her than if the sand was not there. By pulling on the quarter and endeavoring to turn the ship about her amidships as a pivot, it is evident a greater force could be exerted to break up this bed of sand. Moreover, these cables, one fastened to her starboard and one to her port quarter, were attached to the ship twenty or twenty-five feet above her keel, thus giving this leverage to the tugs to enable them to revolve her upon her keel. For example, we all know that by fastening the cables up on the masts a little above the decks, ships are often hove down to scrape or repair their bottoms.

That this had some effect is evident from the fact that when the tugs began pulling the ship surged over to port, but when they relaxed and fell around more to the stern, at the time they were getting into position to pull her off, she again rolled back to starboard, a conclusive proof, to my mind, that though she had been broken in her bed she was resting her keel upon the bottom and was far

from being afloat. Much stress is laid upon the anchor laid by the Queen and which was attached to a cable having a four-fold purchase rigged upon it and operated by the steam capstan.

This anchor was put out under the directions of the officers of the Queen, for the purpose of holding her and to aid in extracting her from her perilous position; yet this anchor was run in pretty nearly the same direction as that last occupied by the tugs, in relation to the Queen. I will not go into this question further as to the libellants and intervenors, but will say that I thoroughly concur in the finding of the district judge, which is affirmed.

Fourteenth—That, in the performance of the services, the libellants on board the tugs under the management of the libellant, George Flavel, were exposed to considerable danger and risk, and that the four tugs, managed by libellant, George Flavel, were in considerable danger of destruction during the performance of the services. This finding is challenged, and is examined by the counsel for the claimant in the second sub-division of his consideration of the ingredients of a salvage service.

I will not attempt to give all the reasons that have led to my conclusion on this point. The finding and the way in which it is expressed, recommend it to my approval, upon the evidence. The risk or danger may not have been, and was not of the highest character, but it certainly was worthy of consideration. It was greater than that of an ordinary towage service. If there was no other evidence it would be sufficient to note that fears for the safety of the tugs were expressed by those on board the Queen; and though the weather and the sea were not of the most dangerous nature, still the safety of those on board the tugs was identified with that of the tugs themselves, and in such a scene what would have been the result of any accident must remain largely a matter of conjecture, but we know from general experience that on such occasions there is always more or less danger. The fact that Capt. Flavel said to one or some of his men, "Stay here. You can't drown, anyhow," is dwelt upon by the advocate for the claimant as showing *his*, Flavel's, estimate of the danger, but taking the evidence altogether, I think the more reasonable view is that there must have been some danger when Capt. Flavel found it necessary to quiet the apprehensions of experienced men by such a remark. However, that is not important, for it is plain the tugs could not have been damaged to the extent they were—over three thousand dollars being allowed—and admitted—for repairs to the tugs—if something more than ordinary risk had not been incurred. Again, the risk of grounding and of loss of one or more of the tugs was not an ordinary risk, and, as before remarked, the safety of the crew was in a measure identified with that of the tug they were on. I consider the finding a very proper one, and I affirm it.

Fifteenth—That no contract was made or entered into between the libellants and claimant in relation to the services so rendered by libellants as to the compensation to be paid or received therefor,

and that the value of such services should be determined under the general admiralty law.

This finding is admitted.

Sixteenth—That the bills presented by the intervenor, Gray, to George C. Perkins and paid, were presented and paid under the apprehension that the libellant, George Flavel, would settle his demands on the basis of services rather than of salvage and with the understanding that if it should prove otherwise, and legal proceedings for salvage should be instituted then the rights of the intervenor should not be prejudiced by such settlement.

This finding is challenged, but I find the evidence of Capt. Gray to be very clear upon the point, and in comparing it with that of Gov. Perkins, I see no reason to disbelieve it. Gov. Perkins admits some such conversation, but places a different construction upon it, but his memory is not so decided nor so clear as Capt. Gray's, and, as I have said, I can see no reason to doubt the latter, but if there were any doubt upon the question, the testimony of Mr. Noyes, a disinterested witness, would resolve it in favor of Gray. This finding will be affirmed with the exception of the word "apprehension." Apprehension conveys some idea of fear, I think the word expectation more nearly represents the state of facts disclosed by the evidence. With this alteration the finding of the court below is affirmed.

Seventeenth—That the value of the property saved is as follows: The Queen of the Pacific, four hundred and eighty-five thousand dollars; her cargo, two hundred and twenty thousand dollars; express matter, twenty-two thousand seven hundred and fifty dollars; passenger fares, three thousand one hundred and twenty-four dollars and fifty-six cents; freight earned, five thousand nine hundred and twelve dollars and twenty-eight cents; making in all the sum of seven hundred and thirty-six thousand seven hundred and eighty-six dollars and eighty-four cents.

This finding is admitted.

Eighteenth—That the amount of cargo jettisoned was about six hundred and thirty-two measurement tons, valued at about ninety-five thousand dollars.

This finding is admitted.

Nineteenth—That the value of the property employed in performing the salvage services aforesaid was as follows: By the libellants, one hundred thousand dollars; by the intervenors, Gray *et al.*, fifty thousand dollars; making in all the sum of one hundred and fifty thousand dollars.

This finding was challenged, but was abandoned on the trial, and is consided admitted. I only care to remark upon this as an element in determining a salvage award, that it is a considerable amount of property for salvors to put at risk. It is about one-fifth the value of all the property saved, which, as I have said, was itself an extraordinary amount.

Twentieth—That the expenses incurred by the libellant George Flavel, in and about the performance of the salvage services were as follows: For repairs to the tug Brenham, eight hundred and twenty dollars; to the tug Columbia, one thousand one hundred and twenty dollars; to the tug Astoria, five hundred and sixty dollars; to the tug Pioneer, seven hundred dollars; in all the sum of three thousand two hundred dollars.

This finding is admitted.

Twenty-first—That neither of the libellants nor the intervenors would have been entitled to any compensation if the property had not been saved.

This finding is challenged, but upon what ground, I am ignorant. The point has not been argued before me. The finding is affirmed.

Twenty-second—That the libellants and intervenors are entitled, according to the rule of the admiralty law, to the sum of sixty-four thousand seven hundred dollars, as compensation for the services rendered by them, which sum should be distributed among them as follows:

[Here follows the distribution made by the district judge.]

This award is, of course, the great issue in the case, to the determination of which all other findings tend, and the remarks already made in considering them, render any further discussion of the ingredients of the salvage service unnecessary. It simply remains now to determine whether or not this award is disproportionate to the services rendered. In arriving at a conclusion the whole case must be taken into view. The award is sixty-four thousand seven hundred dollars in all. It is liberal, but the case demands that it should be. It would have failed to satisfy the rules and theories of admiralty law if it had not been. The benefit to commerce and to the public, as well as to the owners, has been great. The amount of property rescued from almost inevitable destruction is very large indeed—nearly one million dollars, loosely speaking. The risk to life and property of the sailors, while not of the highest degree, was well deserving consideration.

It is a liberal award, as I have said, but I am not prepared to say that it is too liberal. On the contrary, taking the whole case into consideration, I am satisfied it is no more than true policy and justice require. The distribution of the award I shall not go into. The district judge had the parties and the witnesses before him, and I am satisfied that he considered well the distribution he made. It is satisfactory to me. The finding is affirmed.

There are certain other intervenors in the case, though how they get here is a question. On looking at the records I find they never filed any stipulation in the district court, and the only way they appear before me is by this notice of appeal. No one has appeared for them in court, and, as I have said, their being in court is irregular. Their cause was considered abandoned in the district court, and was ordered dismissed; I affirm that decision.

The decree of the district court in this cause is affirmed.

I have concluded to allow no more than six per cent interest, maritime interest, upon the amount of the award from the date of the decree in the district court.

Counsel in preparing the decree of this court will conform to that of the district court in all respects except in the particular I have mentioned, relative to the conditional settlement with Capt. Gray. For the word "apprehension" will be substituted "under the expectation and upon the hypothesis."

SUPREME COURT OF ARIZONA.

UNITED STATES *v.* TENNEY.
UNITED STATES *v.* KEMP.
UNITED STATES *v.* CHRISTOFFERSON.

Filed October 16, 1885.

POLYGAMY—INDICTMENT—OFFENSE HOW ALLEGED.—An indictment for polygamy is sufficient if it charges the crime substantially in the language of the statute defining the offense. And the addition of language reciting cohabitation after charging polygamy, and as following the polygamous marriage, could not mislead, or injuriously affect the defendants, and is immaterial.

EVIDENCE OF GENERAL REPUTATION IS ADMISSIBLE IN CORROBORATION, to prove a polygamous marriage or unlawful cohabitation.

THE SAME—EVIDENCE OF PRIOR RELATION BETWEEN DEFENDANT AND WIVES.—On a trial of such indictment evidence of the relation which existed between the defendant and his alleged polygamous wives, prior to date charged in the indictment, is admissible, on the part of the prosecution, especially if such evidence is first introduced by the defendant.

THE SAME—REFRESHING MEMORY FROM CENSUS RETURN.—A witness, who had been a census enumerator, may examine and refer to the census return filed by him, to refresh his memory in regard to the names and numbers of the defendant's family at the time he took such census.

THE SAME—STATUTES OF TERRITORY WHEN REGULATE PROCEDURE.—In a court with jurisdiction over offenses for violations of an act of congress, where the United States statutes are silent as to matters of practice, method of proof and procedure, territorial statutes may be invoked and applied to the case. Thus the United States statute being silent as to what shall constitute as well as the method of proving marriage, the statute of the territory on that subject may be resorted to and applied.

INDICTMENTS for polygamy and unlawful cohabitation. The opinion states the facts.

John A. Rush, *Thomas Fitch* and *John C. Herndon*, for the appellants.

J. A. Zabriskie, *U. S. Attorney*, and *E. W. Wells*, *Assistant U. S. Attorney*, for the respondent.

FITZGERALD, J. These three cases having been tried, before the third judicial district court, at Prescott, Chief Justice Howard, who presided at the trials, submitted the questions, involved in the record on appeal, to Judges Pinney and Fitzgerald.

The facts involved in the three cases, being similar, the questions of law, in each case, identical,—with the exception of the question of

the admissibility of evidence of general reputation, to prove the marriage relation, which question arose only in the case of Tenney, no evidence of general reputation having been offered in the other cases,—by stipulation of parties, the three cases were argued and submitted together.

The defendants were each convicted of the crime of polygamy as charged in the first count of the respective indictments. Motion for a new trial was made in each case and denied. The defendants were each sentenced to imprisonment in the Detroit house of correction, for the period of three years and six months, and to pay a fine, to the United States, of five hundred dollars. From the order overruling the motion for a new trial, and from the final judgment, the appeal is taken to this court.

The first assignment of error refers to the over-ruling of the demurrer to the first count of the indictment, on the ground that the facts alleged, constituted two distinct causes of action. The first count, it is true, contains more than was necessary to properly charge the crime of polygamy, but the objectionable words, referring only to cohabitation, after properly alleging the polygamous marriage, were clearly surplusage and could not have misled, or worked injury to the defendant. The first count charges the crime substantially in the language of the statute, creating and defining the offense. The incorporating into the first count, words in excess of what was absolutely necessary to charge the offense, not materially affecting, rendering doubtful, and by no possibility expanding, the offense charged, are but surplusage. It was clearly the intention of the pleader, to charge the statutory offense of polygamy, in the first and second counts of the indictment; and the offense of unlawful cohabitation by the third count. To say that the expansion of the first count, by the addition of language reciting cohabitation after charging polygamy, and as following the polygamous marriage, could have misled, or resulted injuriously to defendant, is untenable: People v. Cronin, 34 Cal., 191; People v. Murray, 6 W. C. R., 643; 25 Ala., 64; U. S. v. Simmons, 96 U. S., 360; 1st. Bishop's C. P. 274, 360, 371, 193, 277. We are of the opinion that the ruling of the court below, on the demurrer to the first count in the indictment, was correct.

The second assignment refers to the ruling of the court in the Tenney case, the question not arising in the other cases submitted, in allowing the witnesses, Hubbell and Barth, to testify to the general reputation in the community where they lived, as to the relation of husband and wife existing between defendant Tenney and his wives. The jury were distinctly charged, that the evidence of general reputation, standing alone, would amount to nothing in such a case; that it was only an incident and circumstance to be considered in connection with all the other proof and circumstances; there being no positive proof of an actual marriage ceremony, to enable the jury to find and determine, either the main fact charged, the polygamous marriage, or the unlawful cohabitation. The doubt, surrounding the

admissibility of this character of evidence, is removed by a reference to the territorial statute; to which it appears the trial court resorted in the absence of a congressional enactment, or regulation on the subject. Section 123 of chapter 10, compiled laws, provides: "It shall not be necessary to prove, either marriage by the register or certificate thereof, or other record evidence; *but the same may be proved by such evidence as is admissible to prove a marriage in other cases.*" That reputation is competent in "other cases," there can be no doubt: 1 Bishop on Marriage and Divorce, 438, 439; 2 Greenleaf, 461–462. If there was doubt as to the propriety of resorting to this character of evidence in a criminal case, in view of the statute above cited, and the charge of the court, as to the proper application of that class of evidence—that it was but secondary and circumstantial; not sufficient in itself to warrant the finding of the polygamous marriage or cohabitation—we are of the opinion that the defendant has no ground to complain of its admission. Considering the silence of the United States statute, with the fact that the territorial act above referred to, provides for this kind of proof in such cases—notwithstanding the claim made by appellants, that the territorial practice act cannot be applied to proceedings for violations of congressional laws—the court seems to have been warranted in the resort to this class of evidence; especially when its weight and sufficiency was carefully guarded, as in this case. In view of the very positive charge of the court, that the jury must find, in order to convict the defendant, the marriage to have been contracted and entered into within the third judicial district of Arizona, and since the passage of the act of congress referred to, March 22, 1882, the correctness of the ruling, in admitting the evidence as corroborative only, as the court directed, is beyond dispute.

The fourth assignment refers to the testimony admitted by the court as to facts occurring without the jurisdiction of the court, more than three years before the finding and presentation of the indictment. A sufficient answer to this objection is found in the fact that the record shows the defense to have "opened the door;" and by the introduction of evidence, as to what had occurred in Utah and other places before the time when it was, by the indictment, alleged that the defendants committed the crime of polygamy in Arizona, fully justified the court in allowing the prosecution to follow the defense over the wide range it had covered, by its questions to the witnesses.

We are of the opinion, however, that the evidence, when confined, as it was by the charge of the court, to an interpretation of the character of the relation existing between the defendant and his two wives; and, guarded as it was by the emphatic charge of the court, as to the duty of the jury in finding the polygamous marriage within the district, and within the time alleged in the indictment, could have done no injury to the defendant; and, in view of the fact that the defendant first introduced, by repeated questions to plaintiffs' witnesses, this evidence, to which he now objects, we hold that he

should not now be heard to except to it. A party who shrinks from an exposure of his ancient peccadillos ought not to put them in evidence; having done so, he cannot be heard to complain that the court allowed the other party to follow in his lead.

The fourth and fifth assignments are practically covered by the consideration of the last, except that portion of the fifth which refers to the use of the census returns by the witness Ruiz, to refresh his recollection in regard to the facts appearing upon the face of the returns. The witness Ruiz was the census enumerator for Apache county. The census returns, filed in the office of the secretary of the territory, is, by the statute, made an "official document," and evidence of its contents. The witness Ruiz, who took the census, was permitted to examine and refer to the return thus filed by him with the secretary, to refresh his memory. In addition to which the witness stated that, from his own recollection, irrespective of the official return, he was able to state what the accused gave him, as the names and number of the members of his family, at the time he took the census. Taking the statement of the witness—the official and authenticated character of the document referred to—we can conceive of no more correct method of proving the facts shown by the census return than was allowed in this case.

The sixth assignment is fully answered by the consideration of the fourth and fifth.

The remaining assignments of error, upon which the appeals in these cases are based, refer to the charge of the court. We might dispose of the question raised by these assignments, by the simple statement, that the exceptions to the charge of the court, are general, not specific, and do not, *to any extent*, designate the particular charge, part of charge, modification of request, or refusal to charge, to which defendant takes exception, or which he here incorporates into the record, as the basis of the allegation of the erroneous charge of the trial court. We prefer, however, to consider the charge upon its merits, as a correct exposition of the law applicable to the case. We enunciate as the correct principle in the consideration of the charge of the court, that the whole and entire charge should be considered together. That a dissection and presentation of isolated, fragmentary portions of the charge, so separated and divided as to pervert the meaning and sense, which would naturally follow a consideration of the whole, is not the legal or fair presentation to the appellate tribunal, of the charge and instructions of the trial court. The charge should be considered as a whole. The argument on appeal in these cases, appears to have proceeded upon the erroneous impression on the part of appellants, that while the indictment was found under the United States statute, known as the "Edmunds' law," the trial and proceedings, subsequent to arraignment, was had under and pursuant to the territorial statute and practice. A reference to the record will show the fallacy of this claim, which is more than insinuated in the brief and argument of appellant. The trial court held, that in a court with jurisdiction over offenses for viola-

tion of an act of congress, where the United States statutes were silent as to matters of practice, method of proof and procedure, the territorial statute might be invoked and applied to the case. Thus, the United States statute, being silent as to what shall constitute a marriage, as well as the method of proving marriage, the statute of the territory, prescribing what shall be necessary to constitute a marriage, as well as the territorial law providing the manner of proving marriage, could be properly resorted to and applied. In this we think the trial court was clearly correct.

Congress has legislated for the punishment of the violation, and the prostitution of the marriage relation. It has not defined marriage. It has not formulated or provided any method, or prescribed the character of proof, in such cases. The alleged offense was committed,—as the jury, under the charge of the court below, must of necessity have found,—within the limits of the third judicial district of the territory of Arizona; and within the time fixed as the limitation, by the so-called "Edmunds' anti-polygamy law." To apply the existing territorial law defining marriage, and prescribing the method of proof, in our opinion, was clearly within the rule recognized in all cases where congressional laws are sought to be enforced by courts possessing jurisdiction of United States cases in the territories. The assumption and assertion that the appellant was indicted under the law of congress, and tried under and by the rule of the territorial law, is not warranted by the facts disclosed by the record.

The resort, by the court to the territorial legislative definition of marriage, and the method of its proof, suggests itself to us as not only proper but the only course to pursue in the absence of congressional statute: Clinton v. Englebrecht, 13 Wal., 434; Hornbuckle v. Toombs, 18 Wal., 652; Miles v. United States, 103 U. S., 305; Section 914, U. S. Revised Statutes; Reynolds v. United States, 98 U. S., 145.

The laws of the United States being silent on the subject, section 123 of compiled laws, Ariz., 1877, is the rule of decision in this case, and becomes applicable on the trial: Sec. 21, page 397, Compiled Laws; sec. 7, page 571, Compiled Laws. The particular portion of the proceeding in the court below, at which this objection is aimed by the seventh assignment of error, is included in that part of the charge wherein the court read from the territorial statute, and commented as follows, "This rule prevails, that where, in matters of practice, the statute laws of the United States are silent, in the territory or state where United States courts are held for the trial of causes under the United States statutes, the local statutes may be invoked for the purpose of interpreting the law governing the practice, and conducting the proceedings of the court." By a subsequent portion of the charge, it is apparent, and the jury were so charged, that the interpretation referred to applied only to the constituent elements of a marriage contract, and to the method of its proof. This portion of the charge was confined to a reading of

the statute, section 1,891, compiled laws of Arizona, as follows: "Marriage is considered in law as a civil contract, to which the consent of the parties is essential." As to the manner of proving polygamous marriages, the court referred to a portion of section 123, chapter 10, compiled laws, which reads as follows: "It shall not be necessary to prove either of said marriages, by the register, or certificate thereof, or other record evidence, but the same may be proved by such evidence as is admissible in other cases; and when such second marriage shall have taken place without this territory, cohabitation in this territory, after said second marriage, shall be deemed the commission of the crime of bigamy." It is clear that, in the absence of this statute, a charge to the jury, instructing them as to the character of evidence to prove a marriage, embodying the essential points covered by this statute, would have been correct. It is beyond dispute that this reference to the statute is unobjectionable, when taken in connection with the other portion of the charge, by which the jury were distinctly instructed that they must be satisfied that the first marriage existed; that the second marriage was contracted within the territory, and within the time fixed by the United States statute defining and punishing polygamy.

Upon a careful examination of the whole record, including the charge of the court, in the three cases, we are satisfied that the defendants had fair and impartial trials. It is due the trial court to state, that no precedents existed in this territory by which it might be guided in cases under the so-called "Edmunds' act." We failed to find in the record any material error. For these reasons, the court is of the opinion that the motion for a new trial was properly overruled, and that the judgment was correct.

PINNEY, J. The facts in these cases are conceded to be about the same in each case. The record in the Tenney case is the only one brought up. Six witnesses were called and sworn on behalf of the government. The defendant introduced no proof in his own behalf. The question is, Do the facts, as testified to, make a case in the law? The evidence, as given by the different witnesses, is nearly the same, and consists mainly in admissions made, from time to time, by the defendant.

Tenney, the proofs show, lived with two women in the same house, and by them had several children, which were admitted by the defendant to be his children. The women were known as Mrs. Anna Tenney and Mrs. Eliza Tenney. At the store of Mr. Barth, the defendant gave orders to let his two wives, Anna and Eliza, have goods, which was done at different times, and paid for by him. Mr. Trauer, the clerk at the store, testified: "He has acknowledged to me that these two women were his wives; that it was better to have two wives than be running around after other women."

Mr. Barth testifies: "He always gave us orders to let the women and children have what they wanted when they came to the store, and charge it to him. He paid the account. The general reputa-

tion is that these two women are defendant's wives. At the windmill, three or four years ago, first one came in, Anna, and he said, 'This is my wife;' and then, when Eliza came in, he said, 'This is my other wife.'" And to all of the witnesses the defendant has, at different times and places, stated that both these women were his wives.

In Miles v. United States, 103 U.S., 304, the defendant was indicted for bigamy. The indictment charged that Miles, "did, on the twenty-fourth day of October, 1878, at Salt Lake county, in the territory of Utah, marry one Emily Spencer, and that afterwards, and on the same day and at the same county, did marry one Catherine Owens." On the trial of that case, certain declarations and admissions, made by the defendant concerning his marriage, were admitted in evidence. What those admissions were, does not appear, but concerning them the supreme court, say:

"The declarations of plaintiff in error, touching his marriage with Emily Spencer, admitted in evidence against him, appear to have been deliberately made, and under such circumstances as tended to show that they had reference to a formal marriage contract between him and her. We are of the opinion that the district court committed no error in admitting such declarations."

Counsel for defendant, insists that the record in this case discloses no admissions of Tenney of any "formal marriage contract," with either Anna or Eliza; and no admission of any marriage contract at all, or marriage ceremony at all. It will not be denied but that the admissions and confessions of a defendant, in a polygamy or bigamy case, can be used, and go to the jury for what they are worth.

It is conceded by the able counsel in his argument in this case, that if the admissions were precise declarations, describing a time, a place and a ceremony, that this would then become evidence of that ceremony. At the same time counsel insists that mere statements by defendant, that these two women were his wives, utterly fails to make such a case as the law requires in actions of this character. I am not unmindful of the fact that confessions of marriage are sometimes made to justify the conduct, and screen the party who happens to be living in open adultery. A confession may also be made of a supposed marriage, when the party is ignorant of the law, and may honestly suppose a marriage to have taken place, when in fact no lawful marriage ever took place, and hence, some cases may be found where the courts refuse to hold a marriage proven upon the unsupported admissions of the defendant. Each case must necessarily depend upon the particular circumstances surrounding it.

An admission deliberately made, "This is my wife," means something. Webster defines wife to be: "The lawful consort of a man, a woman who is united in the lawful bonds of wedlock."

Why should not an admission of this character be entitled to as much weight as the testimony of one who saw the marriage ceremony performed, or to as much weight as the admissions of a party

which tended to show they had reference to a formal marriage contract. It seems to me that if a man deliberately admits that the woman he lives with is his wife, that this is at least *prima facie* evidence that there had been a marriage contract between the parties. And when we add to this fact, that the parties had lived together as husband and wife, for a long time, raised children, and held themselves out to the world as husband and wife; this ought to be pretty good proof of marriage, and all this appears in evidence.

The importance of these cases, has caused me to add this much to what has been written by my associate.

The orders and judgment of the court below are affirmed.

WOFFENDEN v. CHARALEAU ET AL.

Filed October 20, 1885.

MARRIED WOMAN'S SEPARATE PROPERTY—CONVEYANCE OF.—Under section 1 of the act of 1871, relating to the separate property of married women, a married woman may convey her separate real estate, without her husband joining in the deed.

THE SAME—RENTS AND PROFITS—BONA FIDE PURCHASER FROM WIFE.—Under such act the rents and profits of the separate estate of a married woman are common property. If she purchase real estate therewith, a subsequent *bona fide* purchaser thereof, from her, takes the same free from all claim of the husband.

APPEAL from a judgment of the district court, Pima county. The opinion states the facts.

F. W. Gregg and *H. R. Jeffords*, for the appellant.

Farley & Franklin and *Alexander Campbell*, for the respondents.

PINNEY, J. In June, 1882, appellant filed his complaint in the Pima district court, alleging that he and defendant Anna C. Woffenden were married in August, 1872, in the city of Tucson, and continued to be husband and wife until May 1879, when they were divorced.

The complaint then sets up that defendant Anna C. Woffenden acquired as community property certain lots and real property, some of this property being purchased by her in 1873, and some in 1874, and that during their marriage relation, defendant Anna C. Woffenden received and appropriated to her own use the rents and profits of this real property, and that during the continuance of said marriage relation, defendant, Anna C., appointed defendant Jean P. Charaleau, an agent, to collect the rents and profits, and that since the dissolution of the marriage, defendant Charaleau has continued to collect and retain the rents and profits, but has refused and still does refuse to account for, or pay to plaintiff any part thereof. The complaint then avers that defendant Charaleau gives out, asserts and claims that he is the owner of the whole of the property described in complaint; that his pretense and claim is without right. Added to this is a prayer:

1st. For the appointment of a receiver to collect the rents and profits.

2nd. That defendants account to plaintiff, and pay over to him, one-half of the rents and profits received from said lands since May, 1879.

3rd. That it be decreed that plaintiff is the owner of an undivided half interest in the lots and lands described.

4th. That defendant Charaleau be forever enjoined and barred from asserting any title or claim to the same.

5th. That the property described be equally divided between plaintiff and defendant Anna C.

The answer denies that plaintiff and defendant Anna C., acquired as community property the lots and lands set forth in complaint, and alleges that the same was bought and paid for by her with moneys possessed by her prior to her marriage with plaintiff; denies that defendant Anna C. received and appropriated to her own use, rents and profits of any community property; denies that she appointed defendant Charaleau agent, to collect rents and profits.

The separate answer of defendant Charaleau, sets forth that he is the owner, in good faith, and for a valuable consideration of the real estate described in complaint; that he purchased the same in June, 1875, and immediately entered into exclusive possession of the same.

At the trial in the court below, the plaintiff proved that the defendant Anna C. Woffenden purchased the various parcels of land mentioned in the complaint with moneys which she collected from rents of her separate property, some of which she had before her marriage, and some she bought afterwards. The plaintiff then offered to prove that all the lands mentioned in complaint were purchased during coverture by Anna C. Woffenden from the rents, issues and profits of her separate estate. This was objected to and objection sustained by the court, for the reason that this court had in the case of Pedro Charaleau v. Richard Woffenden, 1 Arizona Rep., 243, decided that the rents and profits of a married woman were her own separate property, and not the common property of husband and wife. And the question is here again squarely presented. Do the rents, issues and profits of a married woman's separate property become solely vested in her, or is the same community property?

If the legislature has by statute fixed the rights of husband and wife in plain and unambiguous language, then there is no room left for a construction by the court.

Section 1, chapter 32, provides: All property both real and personal of the wife owned by her before marriage and that acquired afterwards by gift, devise, etc., shall be her separate property.

Section 6 of that chapter provides: The husband shall have the management and control of the separate property of wife during the continuance of the marriage, but no sale or other alienation of any part of such property can be made, etc., unless by an instrument in

writing signed by the husband and wife, and acknowledged by her upon an examination separate and apart from her husband.

Section 9 of the same chapter provides: The husband shall have the entire management and control of the common property, with the like absolute power of disposition as to his own separate estate. And the rents and profits of the separate estate of either husband or wife shall be deemed common property, unless in the case of the separate property of the wife, it shall be provided by the terms of the instrument whereby such property may have been bequeathed, devised or given to her, that the rents and profits of such property shall belong to the wife, and shall not be liable for the debts of the husband.

In 1871 an act relating to the separate property of married women was passed and approved as follows:

Section 1. Married women of the age of twenty-one years and upwards, shall have the sole and exclusive control of their separate property, and may convey and transfer the lands, or any estate or interest therein, vested in or held by them, in their own right, and without being joined by her husband in such conveyance as fully and perfectly as they might do if unmarried.

Sec. 2. All acts and part of acts, so far as they conflict with the provisions of this act, are hereby repealed.

This act repeals section 1, *supra*, in so far as the same is in conflict therewith. The provisions of the act are clear and plain. The wife shall have full power to sell, etc., without joining her husband in the conveyance. It is perfectly clear then that under this law, the wife had the right to sell and convey the property in dispute. It is also clear under section 9, *supra*, that the rents and profits of either husband or wife is common property. By that act it is provided, that the wife shall have the sole and exclusive control of her separate property with power to sell, etc. Nothing is said about the rents and profits, while the other portion of the statute stands in full force, making the rents and profits common property. True, the wife has the right to sell and convey, but if she does not desire to do that, and prefers to retain, hold on to, and rent the same, then the rents received by her become common property, and the same could be reached by a creditor, or by the husband himself, if the action was brought in the proper time and manner.

Should she use this common money, received for rents and profits, an action would lie, for money had and received, and possibly under a proper care the husband might maintain an action against her for an interest in real estate purchased by her with this common money.

The record in this case shows defendant Charaleau to have been a *bona fide* purchaser of all the real estate in dispute, and whatever right of action the husband might have had against the wife, clear it is that the title of defendant Charaleau cannot be disturbed.

The case of Charaleau v. Woffenden, 1 Ariz., 243, in so far as the same conflicts with this decision, is overruled.

For the reasons given the judgment and order appealed from are affirmed.

HOWARD, C. J., CONCURRING. I concur. The construction given by Mr. Justice Pinney to the statute referred to, seems to be in accord with the views of the legislature of 1885, which body changed and settled the law for the future by enacting: Act No. 5, p. 2; that "the rents, issues and profits of the husband's separate property, shall be his separate property; and the rents, issues and profits of the wife's separate property, shall be her separate property."

It is reasonable to presume that this legislation came from the conviction that the former statute did not express the legislative intent to the same purpose and effect.

SUPREME COURT OF OREGON.

IN RE GOLDSMITH ET AL., INSOLVENT DEBTORS.

Filed October —, 1885.

ORDER REFUSING TO REMOVE ASSIGNEE—APPEAL.—An order of the circuit court, refusing to remove an assignee in insolvency, is not appealable.

APPEALS IN SPECIAL PROCEEDINGS, WHEN LIE.—Where a court or judge is directed by statute to exercise a particular function, in a manner different entirely from the ordinary mode of procedure by action or suit, no appeal to the supreme court will lie, unless provided for in the act itself, for the reason that the general statutes of Oregon, regulating appeals to the supreme court, do not extend to such a case, and no such right exists except by force of a statute.

PETITION for a rehearing. The opinion states the facts.

Henry Ach, for the petitioner.

Joseph Simon, *contra*.

After hearing the appeal herein, the court was of the opinion that it had no jurisdiction to review the decision of the circuit court from which the appeal was taken, and so announced; but the appellant's counsel filed a petition for rehearing, and insists very strongly that the court was in error. He contends that the proceeding in the circuit court was only the exercise of ordinary equity jurisdiction, and that its decision was a decree from which an appeal will lie to this court under the provisions of the statute regulating appeals. If the proceeding had been a suit to remove the assignee, brought in the ordinary way, the counsel would, no doubt, be correct. When the jurisdiction of a court is called into exercise by an action or suit in the regular mode of proceeding, the right of appeal from the judgment or decree rendered therein, as provided by general statute, will, no doubt, attach, whether such jurisdiction is derived from the common law, or has been conferred by statutory enactment. The decision of the supreme court of California, reported in 6 West Coast Rep., 856, to which our attention has been called, that an action of divorce was within the appellate jurisdiction of that court under the former constitution of that state, could, I think, have been

maintained upon this ground, whether such action was in the nature of a case in equity or not. The proceeding, as I understand, was in the ordinary mode of an action in that state, was commenced and prosecuted in the same manner, and differed from other actions only in the nature of the relief sought. This case is not an action or suit; it is a mere special statutory proceeding under the act of the legislative assembly "to secure creditors a just division of the estate of debtors who convey to assignees for the benefit of creditors." The clause under which the proceeding was had, provides that the circuit court, or judge, may, in certain cases, appoint an assignee. It says: "If on complaint before the court or judge, it should be made to appear that any assignee is guilty of wasting or misapplying the trust estate, said court or judge may direct and require additional security, and may remove such assignee, and may appoint others instead." Such a complaint was made to the circuit court in this case, and it refused to remove the assignee, but did require him to give additional security, and it is from that ruling that the appeal was taken. The proceeding was had before the court, but might just as well have been had before the judge. It was a mere summary affair, except so far as the parties attempted to dignify it by making up an issue, having a referee appointed, and by going through with all the formality of taking depositions and having a finding of facts and law, and hearing before the court. Such a prolix affair could never have been contemplated by the legislative assembly when it passed the act. It would consume too much of the estate in fees and expenses, and giving the right of appeal to this court, would delay its settlement beyond all reasonable forbearance. At all events, I am satisfied that the right to such an appeal does not exist unless especially given. I am of the opinion that where a court or judge is directed by statute to exercise a particular function in a manner different entirely from the ordinary mode of procedure by action or suit, no appeal to this court from the determination of such court or judge will lie unless provided for in the act itself, for the reason that the general statutes of this state, regulating appeals to this court, do not, in my judgment, extend to such a case, and no such right exists except by force of a statute: Wilcox v. Brown, 4 Neb., 572. In Morgan v. Thomhill, 11 Wall., 65, an appeal was taken from a decree of the circuit court of the United States for the district of Louisiana to the supreme court, made in the exercise of its supervisory jurisdiction, conferred by the bankrupt act of second March, 1867. A motion was made in the supreme court to dismiss the appeal, upon the grounds that the decree was rendered by the circuit judge by virtue of the special power conferred on the circuit court, on the judge thereof, to exercise a general superintendence and jurisdiction of all cases and questions arising under said bankrupt act, and that from such class of decrees no appeal would lie. The supreme court, in referring to that class of jurisdiction conferred on the circuit courts, said, that the act made no provision for an appeal to that court in any such case, whether the case or question pre-

sented or involved in the bill, petition, or other proper process, was submitted to the court or to a justice thereof, or whether the case or question was heard or determined in vacation or in term time, and dismissed the appeal. The question there determined was analogous in principle to the one under consideration, and I can see no good reason for changing the former view expressed.

It was held in Sharon v. Sharon, before referred to, that the decree for alimony granted in the action of divorce, was in the nature of a final judgment or order, and the appellant's counsel may claim that that is an authority in favor of his position that the refusal of the circuit court to remove the assignee was a final order. There is no similarity between the two cases. But, conceding that the latter order was a final order, it would not follow that an appeal could be taken therefrom. It would not be "an order affecting a substantial right, and which, in effect, determined the action or suit so as to prevent a judgment or decree therein," or "a final order affecting a substantial right made in a proceeding after judgment or decree:" Civil code, section 525.

The petition for rehearing should, therefore, be denied, and it is so ordered.

LORD, J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 8,214.

CARPENTER *v.* HEWEL.

Department Two. Filed October 22, 1885.

NEW TRIAL—NOTICE OF—FAILURE TO GIVE NOTICE OF DECISION.—A notice of motion for a new trial, made twelve days after the decision, is in time, under section 659 of the code of civil procedure, if it appears that no notice of the decision was ever served on the party moving, or his attorney.

A COUNTER CLAIM, TO BE EFFECTUAL, MUST BE DENOMINATED as such in the answer.

EJECTMENT—USE AND OCCUPATION—RENT—COUNTER CLAIM.—In an action of ejectment, a cause of action existing in favor of the defendant against the plaintiff for rent, for the use and occupation of the demanded premises, cannot be set up as a counter claim, as it does not arise out of the transaction, nor is it connected with the subject of the action, set forth in the complaint.

APPEAL from a judgment of the superior court of Stanislaus county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

Schell & Bond, for the appellant.

W. E. Turner, for the respondent.

FOOTE, C. The plaintiff Carpenter brought an action of ejectment for the possession of some land. He alleged an unlawful entry upon the same by the defendant, and his own ouster therefrom, claimed restitution of the premises, and damages for its withholding,

and for rents, issues and profits. The defendant answered, denying the allegations of the complaint. "And further answering," averred himself to be the owner of the premises and entitled to the possession thereof. Alleged a contract by which the plaintiff became his tenant, and, claiming thereunder rent for use and occupation, prayed judgment for the same in the sum of one thousand dollars.

The plaintiff, on the twenty-seventh of May, 1880, moved the court to dismiss "this action without prejudice." The court refused to dismiss the action. Judgment was afterward rendered in favor of the defendant for the amount claimed. The plaintiff's motion for a new trial was overruled, and from the order made therein and the judgment he appealed.

Respondent claims the appeal should be dismissed, because notice of intention to move for a new trial was not filed in time, under section 659, code of civil procedure.

Twelve days had elapsed, from that on which the decision in the case was made, before the filing of that notice. But nowhere in the record does it appear that any notice of the decision in the case was ever served on the plaintiff or his attorney. And no objection was made in the court below by the defendant to the settlement of the statement on said motion. The defendant's pleading, averring title in himself, and the attornment of the plaintiff as his tenant, and praying for judgment of a thousand dollars for his use and occupation of the premises, was nowhere therein "denominated a counter-claim." This should have been done, to make it effective as such: Sec. 581, C. C. P.; Brennan v. Paty, 58 Cal., 330–334. But even had it been so denominated, it would not have constituted a counter-claim.

The matters alleged therein, did not arise out of the transaction and were not connected with the subject of the action, according to the construction which this and other courts have given, as proper to be placed on language such as that contained in section 438, code of civil procedure, subdivision 1: Moyle v. Porter, 51 Cal., 639, 640; James v. Center, 53 Cal., 31; Pomeroy on Remedies, sec. 775; Bliss on Code Pleadings, sec. 375, and cases cited.

The judgment and order should be reversed, cause remanded and the court below directed to permit the plaintiff to dismiss his action on payment of costs and disbursements accruing up to the date of the order refusing to dismiss the same.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed and cause remanded with directions to permit plaintiff to dismiss his action on payment of costs and disbursements accruing up to the date of the order refusing to dismiss the same.

No. 9,763.

SIERRA UNION WATER AND MINING CO. *v.* BAKER.

Department Two. Filed October 22, 1885.

AGREEMENT FOR SALE OF WATER CONSTRUED.—An agreement for the sale and delivery of water construed, and held under it, the plaintiff was bound to maintain a ditch for delivery of the water through it, and to convey this water continuously through this ditch to a place specified, at such an elevation that the water might be conducted therefrom to the defendant's mine; and that the defendant was not bound to put himself in a position to receive such water, so that it would not flow to waste.

INSTRUCTIONS—CONTRADICTORY, MUST BE EXCEPTED TO.—If contradictory instructions are given, the court commits an error of law; but such error must be excepted to when the ruling is made, or it cannot be considered an appeal.

APPEAL from a judgment of the superior court of Sierra county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

S. B. Davidson, I. S. Belcher and *T. C. Van Ness*, for the appellant.

Van Clief & Gier, for the respondent.

THORNTON, J. By a deed bearing date the fifteenth of February, 1871, the Sears Union Water Company, a corporation organized under the laws of the state of California, sold and conveyed to W. R. Morgan and Timothy Donahue, together with other property, the Trainor ditch, situate in Table Rock and Sears township, county of Sierra and state aforesaid. The ditch is described in the deed aforesaid as conveying the water of Slate creek and its tributaries to St. Louis, Sierra county, with all its ravines, dams, flumes, reservoirs and water privileges belonging and appertaining thereto, and also all their interest in the water known as tail water, flowing from Table Rock township, in the county above named.

On the thirtieth of September, 1880, the above-named Morgan and Donahue, parties of the first part, entered into an agreement in writing with defendant Baker, party of the second part. [NOTE.—Daniel Titus was also a party of the second part with Baker, but as he was let out of the contract by a subsequent agreement, and never had any interest in the action, when the party of the second part is hereinafter mentioned, defendant Baker alone is referred to.]

By the agreement just mentioned, the parties of the first part, for a consideration expressed therein, agreed with the party of the second part (who at the date above mentioned claimed to own, and was engaged in mining for gold on certain placer mining claims situate near Sawmill ravine, in Sierra county, in this state, known as the Pioneer mine, operating the mine by the hydraulic process, and requiring for such operation large quantities of water), to construct and at all times maintain, at their own expense, a ditch of sufficient size and capacity to carry and convey all the waters of the parties of the first part from St. Louis, in the county above named, to a point on Sawmill ravine. The ditch so to be constructed was to connect with, take and receive the water from all the ditches then owned or controlled by the parties of the first part at or near St. Louis, and to

convey it to a point or place on Sawmill ravine at a sufficient height or elevation so that the water might be conducted therefrom to the new reservoir at the Pioneer mine, and to deliver continuously all this water through said ditch to Baker, at the point above referred to on the Sawmill ravine.

It was further agreed that the ditch should be kept to its full capacity, unless prevented by heavy snows, with the exercise of due diligence, at all seasons of the year, as long as the parties of the first part should have sufficient water to fill it, and at all other times to supply Baker with all the water belonging to them.

It was declared in the agreement that its object and purpose was to sell and deliver to Baker, at the point or place above mentioned on the Sawmill ravine, all the water from the ditches owned or controlled by the parties of the first part, at or near St. Louis, which water Baker desired to use on the Pioneer mine, in working and developing it.

By a subsequent agreement, supplementary to and in extension of the foregoing, between the same parties, bearing date the third of January, 1882, and to take effect on the thirtieth of September following, until which the provisions of the former agreement as to the furnishing of water were to remain in force, the parties of the first part agreed to furnish to the party of the second part, defendant Baker, in addition to the water to be furnished under the former agreement, the water from the Sackett's gulch ditch, the Emery & Pfarr ditch, the William Stahl ditch, and the S. McCrory ditch. In this latter agreement the parties declare the intent and purpose of it to be that the parties of the first part shall, when required for the use of the Pioneer mine, furnish to Baker all the water they now have in the county of Sierra to the present capacity of their ditches, for the exclusive use of Baker, from and after the thirtieth of September, 1882, until the thirtieth of September, 1885, and in the meantime, and until the thirtieth of September, 1882, they are to furnish Baker water under the former agreement.

In consideration of the furnishing of said water, Baker agreed to pay Morgan and Donahue annually, after the thirtieth of September, 1882, the sum of sixteen thousand dollars out of the first proceeds of the Pioneer mine.

This other provision in the contract should also be mentioned. It is as follows:

"It is further understood and agreed that the so-called tail water from Table mountain township, which is furnished by the Sears Union water ditch, is a portion of the water to be furnished under this contract, and that in case of failure of the party of the first part to procure said tail water during the period of this contract, that a reasonable deduction shall be made on account of such failure, to be mutually agreed upon between the parties hereto," etc.

Pursuant to the first agreement, Morgan and Donahue constructed the ditch required to convey the water contracted to be delivered for the use of the Pioneer mine.

On the twentieth of November, 1882, Morgan and Donahue assigned the two contracts, of date of thirtieth of September, 1880, and third of January, 1882, above mentioned, to the plaintiff, and also conveyed all their property, including the Trainor ditch, located in the county of Sierra. In the same month the Sears Union Water Company conveyed to plaintiff all its ditches and mining properties located in the county last named.

The action is brought to recover of defendant sixteen thousand dollars for water alleged to have been furnished him under the above contracts during the water season of 1883.

It is averred in the complaint that Morgan and Donahue duly performed all the conditions of the aforementioned contracts, on their part to be performed, until the assignment to plaintiff above set forth, and that since that time plaintiff has duly performed such conditions.

The defendant denies the due performance of the terms of the contract by plaintiff or its assignors, and specifically denies the furnishing and delivery of the tail water described in the last agreement, and of the other waters mentioned in the agreement, to defendant, as agreed on, either by Morgan and Donahue or either of them, or by the plaintiff, at any time since the third day of January, 1882.

On the trial the plaintiff requested the court to give the following instruction: "There is not in this state, strictly speaking, an absolute ownership of running water. Such water is, in its nature, incapable of ownership in the same sense in which one is said to own or possess other personal property. The ownership is of the use of the water. Under the deed of 1871 from the Sears Union Water Company to Morgan and Donahue, and the contract between Morgan and Donahue and the defendant, there was conveyed to the latter such tail water as the said Morgan and Donahue had by virtue of the said deed. So long as such tail water did or could flow into the Trainor ditch the plaintiff here, as successor in interest to Morgan and Donahue, could not divert it.

"But the plaintiff was not, under the terms of that contract, obligated to put such tail water into the Trainor ditch near, or at points where it did not naturally flow into it. When such water flowing down a ravine naturally passed underneath the Trainor ditch, the plaintiff was not obligated to build a new dam or ditch for the purpose of putting such water into the Trainor ditch. If the defendant, Baker, was entitled to the water and desired to take it up at such points, it was his duty to put himself in a position to receive it and until he did put himself in such position, he cannot complain if the plaintiff used the water.

"Until the defendant, Baker, the claimant of this water, was in a position to use it, the right to the water, or water right, did not exist in such sense that the mere diversion and use of it by the plaintiff was a ground of action, either to recover the water or for damages for the diversion. If, from the evidence, you find that the defendant was entitled to the use of certain tail water, but that said

water would, or did, naturally flow by or under the Trainor ditch, and the defendant never put himself in a position to receive that water, then in that case the plaintiff had a right to take up and use such water until such time as 'defendant had placed himself in a positon to receive it."

The court gave that portion of the instruction concluding with the words, "could not divert it," and refused the remainder.

The plaintiff reserved an exception to the refusal of the court to give the whole instruction as asked, and to its modification.

We cannot see that the court committed any error in giving that portion of the requested instruction which it did give, of which the plantiff can complain. The first three sentences in the direction given relate to the character of the ownership or property in water in this state, and while they may be correct statements of law, are totally irrelevant to anything contained in this case. There was no controversy herein between the parties as to the character of the ownership of water by Morgan and Donahue or by plaintiff, or whether it was conveyed to Morgan and Donahue by the Sears Union Mining Company, but the controversy related to the point whether plaintiff or its assignors had complied with the contract by which they and it were bound to furnish and deliver certain water to the defendant.

How Morgan and Donahue got their title or ownership to the water they had agreed to furnish and deliver, was a question certainly outside of the case. If they had agreed to furnish and deliver the tail water mentioned in the instruction, they and plaintiff claiming under them were bound to do so; if they had not so agreed, neither they nor plaintiff were bound to furnish and deliver it.

We will add here that there is an incorrect statement in the portion of the instruction given. The statement referred to is that, under the deed of 1871 from the Sears Union Water Company to Morgan and Donahue, and the contract between Morgan and Donahue and the defendant, there was conveyed to the defendant such tail water as the said Morgan and Donahue had by virtue of the said deed. This statement, in point of fact and law, is incorrect.

We look in vain for any conveyance of any water by Morgan and Donahue to defendant. There is no such conveyance in the agreements between them, which have been, as to all material points, fully set forth above. Morgan and Donahue's contract was to furnish and deliver and sell certain water to the defendant, in the manner stated in the agreements, but nowhere was there a conveyance of any water to the defendant.

If the foregoing views are correct, and we think they are, the court below committed no error prejudicial to plaintiff in giving the portion of the instruction above set forth. It may be that defendant was prejudiced by the ruling of the court as to this matter, but we cannot see any prejudice to plaintiff.

As to the portion of the instruction refused, the propositions contained in it could not have been approved by the court and given in its charge to the jury without falling into palpable error.

To show this, it will be necessary to repeat to some extent what has been before stated herein. The water, which was the subject of the aforementioned agreements entered into by Morgan and Donahue, was acquired by them from the Sears Union Water Company. By the deed of the fifteenth of February, 1871, the company above named sold and conveyed to Morgan and Donahue the Trainor ditch, with its tributaries, ravines, dams, flumes, reservoirs and water privileges, and all their interest in the water known as tail water flowing from the Table Rock township.

It is evident, from the perusal of the agreements of Morgan and Donahue with defendant above set forth, that the tail water claimed by them under the deed from the Sears Union Water Company is a portion of the water to be furnished under the above-mentioned contracts of Morgan and Donahue with defendant. This water, it appears from the agreement of third of January, 1882, was also furnished to Morgan and Donahue by a ditch known as the Sears Union water ditch. Morgan and Donahue further stipulated (see agreement of thirtieth of September, 1880) with defendant to construct and maintain, at their own expense, a ditch of sufficient size and capacity, not exceeding a limit specified in the agreement, to carry all the water belonging to them from St. Louis to a point or place on Sawmill ravine, said ditch to connect with and to take and receive the water from all the ditches now owned or controlled by Morgan and Donahue at or near St. Louis, and to convey the said water to a point or place on the Sawmill ravine at such hight or elevation that such water might be conducted therefrom to the new reservoir on the Pioneer mine, and to deliver continuously all said water through said ditch to the defendant, at the said point or place on the Sawmill ravine.

The object and purpose of the agreement is declared in the agreement of thirtieth of September, 1880, and is set out above. All the obligations of Morgan and Donahue, imposed by their agreements, are equally binding on the plaintiff herein, as they were assumed by it.

A consideration of the foregoing stipulations shows that the court was correct in refusing to give the portion of plaintiff's second instruction which it requested.

That the plaintiff was bound by the foregoing agreements to maintain the ditch for delivery of the water through it at a point or place on Sawmill ravine, which ditch was to connect with, take and receive the water from all the ditches owned by Morgan and Donahue at or near St. Louis on the thirtieth of September, 1880, and to convey this water continuously through this ditch to a point or place on the ravine mentioned, at such an elevation that such water might be conducted therefrom to the new reservoir at the Pioneer mine, which was defendant's mine, is so clearly manifest that it cannot be made more so by argument or illustration. This being so, it clearly follows that all the propositions in the rejected portion of the instruction were utterly discordant with any correct view of the case.

The proposition contained in such rejected request, that the plaintiff was not bound to put the tail water referred to in the foregoing agreements into the Trainor ditch, near or at points where it did not naturally flow into it, is entirely irrelevant to any issue involved herein. The plaintiff never contracted to put any particular tail water, or other water, into the Trainor ditch, but it was bound by the contracts to take and receive all the water, including the tail water, from the ditches owned and controlled by its assignors on the thirtieth of September, 1880, and to deliver them continuously at a point on Sawmill ravine, that such water might be conducted from the point last named to the new reservoir on the Pioneer mine. The proposition above stated, and with which the portion of the request rejected begins, is entirely different from this, and such proposition is entirely foreign to any stipulation in the contracts mentioned. Admit everything that is affirmed by it to be true, and it lends no aid to a solution of the questions involved in this case.

The same is true of every other proposition involved in the rejected portion. The defendant was not bound to put himself in a position to receive any water that flowed underneath the Trainor ditch. The plaintiff was bound to deliver all water at the point on Sawmill ravine, mentioned above, from which it might be conducted to the defendant's reservoir at the Pioneer mine, and plaintiff could not without a violation of its contract, suffer the tail water referred to in the contract to run off and to waste in a ravine which ran under the Trainor ditch, or use it for its own profit.

The court, in our view, very properly refused the portion of the request which it was asked to give.

The plaintiff contends that the second instruction, given at request of defendant, is contradictory of the third instruction, given at request of plaintiff, and that the third and fourth instructions, given at request of defendant, are contradictory of the fourth and sixth instructions, given at request of plaintiff.

To this it may be said that the instructions just mentioned as given at request of defendant were not excepted to. Of course, plaintiff would not and could not except to instructions given at its instance. In this state of the case the point as to a conflict between the instructions is not before us for determination. If contradictory instructions are given, the court commits an error of law, and such an error must be excepted to when the ruling is made, or it cannot be considered: C. C. P., section 646. Where, as in this case, on appeal from the judgment and the order denying a new trial, the statement on motion for a new trial fails to show that an exception was reserved to errors of law committed by the court on the trial, no question as to such errors comes before this court for examination.

We find no error in the record and the judgment and order must be affirmed.

So ordered.

MYRICK, J., and MORRISON, C. J., concurred.

No. 8,876.

MEADE v. WATSON.

Department Two. Filed October 22, 1885.

FENCES—STATUTES IN FORCE CONCERNING.—The act of April 27, 1855, concerning lawful fences, and the act of April 3, 1860, amendatory and supplementary thereto, are applicable to the county of Stanislaus. These acts are retained in force by the provision of section 19, of the political code, and the counties to which they are applicable are not subject to the provisions of section 841, of the civil code.

THE SAME—WHAT IS A LAWFUL FENCE.—A fence which forms a perfect inclosure, and is sufficient to turn stock, which is good, strong and substantial and built of stone, is the equivalent of the lawful fences, specifically described in such statutes.

THE SAME—ACTION TO RECOVER FOR PARTITION FENCE.—In an action by an adjoining proprietor to recover, and to foreclose a lien, for one-half the value of a partition fence, it is not necessary to show that all the fences surrounding and inclosing the lands of defendant are lawful fences, within the meaning of the statute. If they have been adopted by him, in completing his inclosure, and serve to inclose his land, and if plaintiff's fence complies with the law, it is sufficient.

THE SAME—STATUTE NOT OBNOXIOUS TO CONSTITUTION—SPECIAL LEGISLATION.—The fence laws retained in force by the code, are not subject to the objection of being special legislation, and therefore obnoxious to the constitution of 1879. They were in force before the adoption of such constitution, and that instrument only applies to statutes passed after its adoption.

THE SAME—DEMAND OF PAYMENT—AVERMENT OF.—In such action a complaint which shows the length of the division fence, and the value thereof at the time the inclosure was made, and that on a certain day the plaintiff demanded payment of one-half of said sum from defendant, which was refused, etc., sufficiently alleged a demand of payment.

APPEAL from a judgment of the superior court of Stanislaus county, entered in favor of the defendant. The opinion states the facts.

Wright & Hazen, for the appellant.

W. E. Turner, for the respondent.

SEARLS, C. This is an action to recover the sum of two hundred and eighty dollars, with interest and counsel fees, and to foreclose a lien, for one half the value of a partition fence.

The appeal is from a judgment in favor of defendant, on a demurrer to the complaint.

In addition to his general demurrer, defendant sets forth as special causes why the complaint is not sufficient, that the fence alleged to have been constructed by plaintiff is not one of the kinds of fence declared to be a lawful fence by the act of the legislature of the state of California, entitled "an act concerning lawful fences," approved April 27, 1855, and the acts supplementary thereto.

B. That there is no allegation in said complaint; that the fence erected by plaintiff is as strong, substantial and as well calculated to protect inclosures as either of the kinds of fence by the said act declared a lawful fence. C. That it appears that neither of the fences described in the complaint is a lawful fence within the meaning of the aforesaid act of the legislature.

The allegations of the complaint essential to a decision on the demurrer are, that the plaintiff and defendant are adjoining landowners; that plaintiff erected upon the line between his land and that of defendant, a good, strong, substantial and lawful stone fence, three and a half feet high, two feet wide at the base, and one foot wide at the top, compact and regular in construction, etc.

The complaint then proceeds to aver that certain other coterminous landowners erected fences, which, together with his and certain fences erected by defendant, served to "and did and now does form a perfect and sufficient inclosure of all said premises, and sufficient to, and the same and the whole thereof did and now does prevent the ingress of stock upon, or the egress of stock from said premises and the whole thereof."

The land of defendant thus inclosed, is not divided by a partition fence from that of Abbott, Shoemake and Tuck, adjoining landowners, but is inclosed in one common inclosure with the land.

The land in question is situate in the county of Stanislaus, and is therefore in one of the counties governed by the act, entitled "an act concerning lawful fences," approved April 27, 1855, statutes 1855, p. 154, and an act, amendatory and supplementary thereto approved April 3, 1860, statutes 1860, p. 141.

These acts are retained in force by the provision of section 19 of the political code, and the counties to which they are applicable are not subject to the provision of section 841 of the civil code: Gonzales v. Wasson, 51 Cal., 297.

The act of 1855, after prescribing the height and mode of construction of lawful fences, when of wire, of post and rail, and various other material, proceeds as follows:

"Section 2. Any fence which, by reliable evidence, shall be declared as strong, substantial and as well suited to the protection of inclosures as either of the above described, shall be a lawful fence in all the counties of this state, except Sonoma, Napa, El Dorado and Marin."

The fifth section of the act of 1855 was amended in 1860: Statutes, 1860, p. 141; to read as follows: "When a fence has been erected by any person on the line of his land, and the person owning the land adjoining thereto shall make, or cause to be made, an inclosure on the opposite side of such fence, so that such fence may answer the purpose of inclosing his ground also, such person shall pay the owner of such fence already erected one-half the value of so much thereof as serves as a partition fence between them," etc.

The ultimate object of the lawful fence is to so inclose land as to prevent the ingress and egress of such domestic animals as are usually nurtured and confined thereon, and to protect the premises inclosed from unlawful encroachment.

At the common law no man is bound to fence his lands against the cattle of another, but each owner is bound to restrain them, and is answerable for any trespass they may commit upon the lands of another. The word "close" is purely technical and relates to the interest in the soil and to its invisible boundaries, and not to those artificial barriers often erected around land.

The whole duty of erecting division and boundary fences, in the absence of agreement or prescription, is regulated by statute, and, as will be seen by our statutes, as quoted, lawful fences may consist either of the specific structures enumerated or of any other barrier,

"which, by reliable evidence, shall be declared as strong, substantial and as well suited to the protection of inclosures as either of the above described."

Keeping in view, then, the object of a lawful fence, viz.: to protect an inclosure, we are of opinion the language of the complaint in this cause sufficiently alleges that the fence constructed by plaintiff, and for the value of which he seeks to recover, was, and is, a lawful fence.

It is not one of the enumerated fences mentioned in the statute, but is described as a stone wall of given dimensions, constructed in a given manner, and is, according to the complaint, a "good, strong, substantial and lawful stone fence * * * and with the other fences now does form a perfect inclosure of all said premises, and sufficient to * * * and now does prevent the ingress of stock upon or egress of stock from said premises and the whole thereof."

A fence which forms a perfect inclosure, and is sufficient to turn stock, which is good, strong, substantial and built of stone, must, we think, be the equivalent of the lawful fences, specifically described in the statute.

The statute, as amended in 1860, does not, in terms, provide that line or division fences shall be lawful fences, but the law having defined what is meant by a *lawful fence*, we must presume that when fences are mentioned elsewhere in the statutes, lawful fences are intended: Enright v. S. F. & S. J. R. R. Co., 33 Cal., 230.

We do not conceive it to be necessary to show that all the fences surrounding and inclosing the lands of defendant, are lawful fences, within the meaning of the statute. If they have been adopted by him, in completing his inclosure, and serve to inclose his land, and if plaintiff's fence complies with the requirements of the law, it must be held sufficient, otherwise a party inclosing his land could always prevent a recovery for fences constructed by others on his lines by omitting to build as provided by statute.

So, too, the fact of defendant's connecting his fences with those already constructed, so as to form an inclosure of his land with that of such others, must be construed as tantamount to an agreement on his part within the doctrine of Gonzales v. Wasson, 51 Cal., 295.

The fence laws retained in force by the code are not subject to the objection of being special legislation, and therefore obnoxious to the constitution.

They were in force before the adoption of our present constitution, and that instrument only applies to statutes passed after its adoption: People v. Jobs, 4 West Coast Rep., 236; *Ex parte* Burke, 59 Cal., 6.

The demand of payment by plaintiff was sufficient.

The complaint shows the length of the division fence to be three hundred and twenty rods, that the value thereof, at the time the inclosure was made, was one dollar and seventy-five cents for each and every rod thereof, and that one-half the total value was and is two hundred and eighty dollars; that on the fourteenth day of Oc-

tober, 1881, plaintiff demanded payment of said sum from defendant, which was refused, etc. Nothing further was required to constitute a valid demand.

Counsel for respondent claims that if a recovery can be had from defendant in this case, he will be equally liable to the other persons, whose fences form portions of the general inclosure, within which his land is situated.

A reference to the statute: Statutes 1860, p. 141; will show that it is only for a proportionate part of the value of *partition fences* that a recovery can be had.

We think the judgment should be reversed and the court below directed to overrule the demurrer.

BELCHER, C. C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is reversed, with direction to overrule the demurrer to the complaint.

No. 8,877.

MEADE ET AL. v. WATSON.

Department Two Filed October 22, 1885.

JUDGMENT REVERSED, on the authority of Meade v. Watson, *ante*.

APPEAL from a judgment of the superior court of Stanislaus county, entered in favor of the defendant. The facts were similar to those in Meade v. Watson, *ante*.

Wright & Hazen, for the appellants.

W. E. Turner, for the respondent.

SEARLS, C. This case involves precisely the same questions as Meade v. Watson, No. 8,876, and the two cases were submitted on the same briefs, and a like judgment should be entered.

BELCHER, C. C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to overrule the demurrer to the complaint.

No. 8,497.

WALKER v. BREM.

Department Two. Filed October 22, 1885.

REFORMATION OF DEED—MISTAKE—EQUITABLE DEFENSE—FINDINGS.—In an action to recover certain land, the answer alleged a mistake in drawing the deed from the plaintiff to the defendant, whereby the land sued for was excepted from its operation, when, according to the agreement of the parties, there was to be, and should have been, only a reservation of a temporary right of way over it. The answer admitted that the title to the land in controversy was still in the plaintiff, and asked that the deed be reformed so as to express the real agreement between the parties. *Held*, that if a mistake was made in drawing the deed, as alleged, that fact should have been found in clear and unmistakable language, and, being found, would have constituted a defense to the action, whether the court went further and actually reformed the deed or not.

FINDINGS—ADMITTED FACTS.—Findings should be confined to the facts put in issue by the pleadings, and, upon such facts as are admitted, no findings are necessary. If, however, findings are made upon admitted facts, they should be in harmony, and not in conflict with them.

APPEAL from a judgment of the superior court of Stanislaus county, entered in favor of the defendant. The opinion states the facts.

Wright & Hazen, for the appellant.

W. E. Turner, for the respondent.

BELCHER, C. C. 1. The demurrer to the answer was properly overruled. The answer denied the plaintiff's ownership or right to the possession of the land sued for, "save and except as hereinafter set forth," and then set up an equitable defense. It stated facts sufficient to constitute a defense, and as a whole was not ambiguous, uncertain or unintelligable.

2. The findings do not meet the issues raised by pleadings. The answer alleges a mistake in drawing the deed from the plaintiff to the defendant, whereby the land here sued for was excepted from its operation, when, according to the agreement of the parties, there was to be, and should have been, only a reservation of a temporary right of way over it. The answer admits that the title to the land in controversy is still in the plaintiff, and asks that the deed be reformed so as to express the real agreement between the parties to it at the time of its execution. If a mistake was made in drawing the deed, as alleged, that fact should have been found in clear and unmistakable language, and, being found, would have constituted a defense to the action, whether the court went further and actually reformed the deed or not: Hoppough v. Struble, 60 N. Y., 430. But the finding was only that "it was agreed at the time of the sale by the plaintiff to the defendant that so long as the plaintiff maintained and run said ferry he should have the right of way across said corner of said land for a road to and from his ferry landing to a point intersecting the county road, and the reservation clause in said deed, as set forth in finding No. 2, was inserted for the sole purpose of reserving to plaintiff the said right of way free from all let or hindrance from this defendant, whilst he, plaintiff, maintained and run said ferry." It was then found "that since the thirteenth day of March, 1878, plaintiff has not been the owner of or

seized in fee of the premises described in plaintiff's complaint, or any part thereof, and since the —— day of March, 1879, has not been in possession of or entitled to the possession of said described premises or any part thereof;" and as conclusions of law, "that the deed of conveyance from plaintiff to defendant, as set forth in finding No. 2, conveyed the absolute title of all the lands in said deed described, and that the reservation clause as set forth in finding No. 2, did not reserve in plaintiff the legal title to any portion of said described premises, nor did it entitle him to possession of any portion of said described premises, save and except during such time as he, plaintiff, was maintaining and running a public ferry as established and maintained at the time of the sale from plaintiff to defendant." Findings should be confined to the facts put in issue by the pleadings and upon such facts as are admitted by the pleadings, and upon such facts as are admitted by the pleadings no findings are required. If, however, findings are made upon admitted facts, they should be in harmony with the facts as admitted, and not in conflict with them. "A finding which negatives the existence of a fact admitted by the pleadings is a finding against evidence and the judgment rendered thereon is erroneous:" Silvey v. Neary, 59 Cal., 97. Here there is no direct and clear finding as to the mistake alleged, and the finding and conclusion as to the operation and effect of the deed are in direct conflict with the admissions in the answer. It follows that the judgment must be reversed.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed.

No. 8,728.

LERCH v. GALLUP ET AL.

Department Two. Filed October 22, 1885.

PROMISE OF INDEMNITY—LIABILITY OF PROMISOR—STATUTE OF FRAUDS—EXECUTION.—The defendants were sureties on an undertaking on appeal from a justice's court. After such appeal had been dismissed, they requested the plaintiff, a constable, to levy execution upon certain personal property, which they stated belonged to the judgment debtor. The plaintiff asked from the defendants a bond of indemnity to secure him against any damages he might sustain by reason of the levy and sale, should they prove to be wrongful. The defendants verbally promised to indemnify him, whereupon the plaintiff levied upon and sold the property under the execution, and thereby paid and satisfied the judgment in full. Such property did not belong to the judgment debtor, and the plaintiff, in an action against him by the owner, was compelled to pay for the conversion thereof. The plaintiff thereupon sued the defendants upon their verbal promise of indemnity. *Held*, that such action could be maintained; that if the execution was issued at the request of the defendants, without the knowledge of the judgment creditor, he ratified and confirmed their act in ordering it, when he accepted the money under it in full payment and satisfaction of his judgment; that the interest the defendants had in having the execution satisfied out of the property of the judgment debtor, was a sufficient consideration for their promise of indemnity, and that such promise was not within the statute of frauds.

APPEAL from a judgment of the superior court of Stanislaus county, entered in favor of the defendants. The opinion states the acts.

Wright & Hazen, for the appellants.

W. E. Turner, for the respondents.

BELCHER, C. C. This is an action on a verbal promise to indemnify the plaintiff, who was a constable, for seizing and selling certain personal property under an execution. The court below sustained a demurrer to the complaint, and the plaintiff declining to amend, judgment was entered in favor of the defendants. The appeal is from that judgment. The facts of the case, as they appear from the complaint, may be briefly stated as follows:

In March, 1875, one Ulloa recovered judgment against one Sotcher for fifty dollars and costs in a justice's court in Stanislaus county. An appeal was taken from the judgment to the county court, and an undertaking to stay execution thereon was signed by the defendants here, as sureties for the appellant, and filed in the case. In February, 1878, the appeal was dismissed. In March, 1878, the judgment remaining wholly unpaid, an execution thereon was issued at the special instance and request of the defendants, and placed in the hands of the plaintiff for service, he being at the time a constable authorized to receive and serve the same. At the time the execution was issued, Sotcher had removed from the state, and had left no property here, so far as plaintiff knew, subject to seizure and sale. The defendants informed the plaintiff that they had discovered certain personal property belonging to Sotcher which was subject to seizure and sale, and they pointed the property out to the plaintiff, and demanded that he, as such constable, levy upon and sell the same in satisfaction of the judgment and execution. The plaintiff, inasmuch as he did not himself know about the property, asked from the defendants a bond of indemnity to secure him against any damage he might sustain by reason of the levy and sale, should they prove to be wrongful. The defendants then assured the plaintiff that the property belonged to Sotcher, and expressly promised him that if he would levy upon and sell the property in satisfaction of the judgment and execution, they would save him harmless, and indemnify him for any damages he might sustain by reason of the levy and sale. The plaintiff, in consideration of the defendants' promise, and at their special instance and request, then levied upon and sold the property under execution, and thereby paid and satisfied the judgment in full.

In March, 1879, one Willians, claiming to have been the owner of the property when it was levied upon and sold, commenced an action against the plaintiff, in the district court for Stanislaus county, to recover the sum of four hundred dollars, the alleged value thereof, and one hundred and twenty-four dollars damages. The defendants were notified of the action, and, at their request and in their behalf, the plaintiff answered to the complaint and used diligence in defending the action. The case was tried in May, 1879, and judgment was rendered in favor of Williams, and against the plaintiff here, for the sum of five hundred and six dollars and twenty-five cents damages and costs.

An appeal was taken to the supreme court and the judgment was there affirmed in December, 1880. In May, 1881, an execution on the judgment was taken out and levied on the property of this plaintiff, and in June following he paid the judgment in full, amounting then to the sum of six hundred and thirty dollars. The plaintiff also in defending the action necessarily expended the further sum of three hundred and seventy-five dollars for counsel fees and other expenses, and he claims to have been damaged in the sum of two thousand dollars by the seizure of his property under the execution. In August, 1881, plaintiff demanded of the defendants payment of the damages, sustained by him as aforesaid, but they refused and have ever since refused to pay the same. This action was commenced in December, 1881, and the plaintiff asks judgment for damages in the sum of three thousand and five dollars. We think the complaint stated facts sufficient to constitute a cause of action, and that the court erred in sustaining the demurrer.

1. The execution on the justice court judgment was issued "at the special instance and request" of the defendants, but it does not follow from that fact that it was issued without the knowledge and request of the party in whose favor it was given, nor, if it was, that the plaintiff knew it was so issued when it was placed in his hands for service. And if it was issued at the request of the defendants, without the knowledge of the judgment creditor, he must be held to have ratified and confirmed their act in ordering it, when he accepted the money made under it in full payment and satisfaction of his judgment: Clarkson v. White, 4 J. J. Marshall, 529.

2. The defendants were sureties on the undertaking on appeal, and were liable to be called upon at any time to pay the judgment. They were interested therein in having the money made out of the property of the judgment debtor. This was a sufficient consideration for their promise to indemnify the plaintiff if he would levy upon and sell under the execution the property which they pointed out to him and asked him to sell: Tarr v. Northey, 17 Me., 113; Train v. Gold, 5 Pick., 380.

3. The promise to indemnify the plaintiff was not within the statute of frauds. Under our statute, "A promise to answer for the obligation of another in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:

"1. Where the promise is made by one * * * who has received a discharge from an obligation, in whole, or in part, in consideration of such promise. * * * * * * *

"3. Where the promise, being for the antecedent obligation of another, is made * * * upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person:" Civil code, sec. 2,794. Here, out of the money made by the levy and sale, the judgment was satisfied and the defendants were discharged from their obligation to pay it. Their promise was, therefore, evidently made upon a consideration beneficial to them.

4. The plaintiff appears to have acted in good faith in levying upon and selling the property pointed out to him. He committed no willful trespass, and there is no reason, therefore, why the promise to indemnify him should not be enforced: Stark v. Raney, 18 Cal., 622; Coventry v. Barton, 17 Johns., 142; Stone v. Hooker, 9 Cow., 154; Nelson v. Cook, 17 Ill., 443; Avery v. Halsey, 14 Pick., 174.

The judgment should be reversed and the cause remanded, with directions to the court below to overrule the demurrer.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded, with directions to overrule the demurrer to the complaint.

No. 9,072.

BRICHMAN *v.* ROSS.

Department One. Filed October 22, 1885.

NEW TRIAL—NOTICE OF—TIME FOR CANNOT BE EXTENDED.—The right to move for a new trial is statutory, and no power is given to the superior court, or a judge thereof, to extend the time for giving notice of such motion beyond the period limited by section 659 of the code of civil procedure.

THE SAME—OBJECTION THAT NOTICE WAS NOT GIVEN IN TIME.—Objection that a notice of motion for a new trial is not given in time must be taken in the court below, or it will be deemed to have been waived, and the time extended by consent of parties; and such objection cannot be raised for the first time in the supreme court.

CLAIM AND DELIVERY—JUSTIFICATION OF TAKING UNDER ATTACHMENT.—In an action of claim and delivery, where the property in dispute was found in the possession of a third person, and was levied upon by the defendant, as constable, under a writ of attachment against him, regular upon its face, issued by a justice of the peace having jurisdiction of the subject matter, and in a case where, under the law, he was authorized to issue the same, such writ is admissible in evidence in justification of the act of the officer in making the levy, together with the summons, affidavit, etc., in connetion with it.

THE SAME—EVIDENCE OF OWNERSHIP—CROSS-EXAMINATION.—In such action, where the answer denies the plaintiff's ownership, and the plaintiff has given evidence tending to establish the same, and that the property in question was in possession of the attachment debtor, under a contract of sale, the defendant has a right to show, on cross-examination of the plaintiff, that the alleged contract of sale was, in fact, a sale *in presenti*, or that the contract did not include all the goods levied upon, etc.

THE SAME—JUDGMENT MUST BE IN ALTERNATIVE.—In such action, a judgment in favor of the plaintiff must be in the alternative form, required by section 667 of the code of civil procedure, although the property has already been delivered to the plaintiff.

APPEAL from a judgment of the superior court of Stanislaus county, entered in favor of the plaintiff, and from an order denying the defendant's motion for a new trial. The opinion states the facts.

P. J. Hazen and *J. C. Simmons*, for the appellant.

C. C. Wright and *W. L. Dudley*, for the respondent.

SEARLS, C. Action to recover personal property. Plaintiff had judgment, from which and from an order denying a new trial defendant appeals. The verdict of the jury was rendered and judgment entered thereon December 7, 1882. Notice of motion for a

new trial was served and filed December 18, 1882, more than ten days after verdict and judgment, and respondent claims here for the first time, so far as is shown by the record, that the motion came too late, and that the validity of the proceedings, so far as involved in the motion for new trial, cannot be considered.

1. A party intending to move for a new trial must, within ten days after verdict, file with the clerk and serve upon the adverse party a notice of such intention: Code of civil procedure, section 659.

2. The right to move for a new trial is statutory, and no power is given to the superior court, or a judge thereof, to extend the time for giving notice of such motion. Section 1,054 of the code of civil procedure does not authorize such order.

3. Objection, however, that a notice of motion for new trial is not given in time, must be taken in the court below, or it will be deemed to have been waived, and the time extended by consent of parties, and such objection cannot be taken for the first time in this court: Patrick v. Morse, 64 Cal., 462; Gray v. Nunan, 63 Cal., 220; Hobbs v. Duff, 43 Cal., 485; Hodgdon v. Griffin, 56 Cal., 610.

It follows that the objection of respondent is untenable, because not taken in the court below. It appears the action was brought to recover personal property, the furniture and fixtures in a restaurant, which, according to the evidence, plaintiff had contracted to sell to one Flanders, when the latter should pay the purchase price thereof, until which time plaintiff was to retain the title. Flanders paid a part of the purchase price and was placed in possession of the furniture and engaged in the business of keeping a restaurant, using the furniture in question therein. Defendant denies plaintiff's ownership of the goods and chattels, avers that plaintiff took possession of the property under proceedings in claim and delivery in this action, and still retains such possession, and for a further answer avers that he is a constable in, and for Empire township, county of Stanislaus, and that as such he levied upon, and took possession of the goods in question, under and by virtue of a writ of attachment issued out of justice court, in an action in which one John Simon was plaintiff and E. Flanders was defendant. That the property in dispute was owned by Flanders and was taken from his possession under said writ, which ran against his property, etc. Defendant first offered in evidence the writ of attachment, which was objected to as insufficient to justify him, as constable, in seizing the property without proof of the regularity of the proceedings under which it issued. The objection was sustained by the court, whereupon the pleadings, summons, undertaking on attachment and affidavit for attachment, as well as the writ, were offered in evidence.

Objection was made to the sufficiency of the affidavit for an attachment, which showed that defendant Flanders was indebted to him, the said plaintiff, in the sum of one hundred and forty-one dollars and fourteen cents on contract, but failed to show whether upon an *express or implied* contract.

The objection was sustained and the papers excluded, and the rulings are assigned as error.

The first question presented is, as to the sufficiency of a writ of attachment, regular upon its face, to justify the officer acting under it. Ministerial officers are presumed to know the law, and are bound at their peril, to know the general jurisdiction of the courts whose process they are called upon to enforce, and if they execute processes which the court has no jurisdiction to issue, they are liable: Freeman on Ex., sec. 100. If, however, a writ is issued by the proper officer, in due form, in a case where he has jurisdiction, and authority to exercise jurisdiction over the subject matter of the writ, and there is nothing on the face of the writ, showing it to be illegal, the officer to whom it is directed and whose duty it is to execute it, may do so, and justify his acts thereunder by producing the writ, although, from some cause not apparent on the face of the writ, the whole proceeding is irregular or void: Freeman on Ex., sec. 101, and cases cited. The rule is the same in case of process issuing out of courts of limited jurisdiction: Savercool v. Boughton, 5 Wend., 170. "A sheriff or other ministerial officer is justified in the execution of, and must execute, all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued:" Political code, sec. 4,187. It is said by Drake, in his work on Attachment (section 185a): "When the officer attaches property found in the possession of the defendant he can always justify the levy by the production of the attachment writ, if the same was issued by a court or officer having lawful authority to issue it and be in legal form. But when the property is found in the possession of a stranger claiming title, the mere production of the writ will not justify its seizure thereunder; it rests upon the officer to go further, and prove that the attachment defendant was indebted to the attachment plaintiff. If in the attachment suit judgment was rendered in favor of the plaintiff, that will establish the indebtedness of the defendant; if not, the officer must otherwise prove the indebtedness, in order to justify his proceeding:" Thornburg v. Hand, 7 Cal., 554; Damon v. Bryant, 6 Pick., 411; Rinchey v. Stryker, 28 N. Y., 45; Horn v. Corvarubias, 51 Cal., 524; Sexey v. Adkinson, 34 Cal., 346. In the case last cited, our supreme court held to the doctrine enunciated by Drake as above quoted, and in very nearly the language of that author.

In Babe v. Coyne, 53 Cal, 261, the writ under which a sheriff had made a levy and the affidavit on which it was issued were introduced in evidence, and this court held that it made out a *prima facie* case of justification of the seizure of the property, notwithstanding the affidavit was originally insufficient, and was amended subsequent to the seizure. This was in a case where the property was in possession of the defendant, and was attached as his property. Had the affidavit not been offered with the writ, the ruling would, doubtless, have been the same.

The reason for distinction between cases where the writ is levied upon property in possession of the defendant in the writ, and where the property is found in possession of a stranger to the writ, is found in the fact that the defendant may, if the attachment has been improvidently issued, move to have it quashed or have an action upon the undertaking, while a third party, a stranger to the writ and the record, could not be heard for such purpose; hence the justice of requiring an officer who takes property, not from the defendant against whom the writ runs, but from the possession of a stranger, whom the law presumes to own it, to show not only his writ, but that it issued regularly, upon a valid demand against the defendant named in such writ. It follows, from these views, that as the property in dispute was found in the possession of Flanders, and was levied upon by the constable, under a writ of attachment against him, regular upon its face, issued by a justice of the peace, having jurisdiction of the subject matter, and in a case where, under the law, he was authorized to issue the same, that the writ of attachment was admissible in evidence in justification of the act of the officer in making such levy; and to exclude it was error. It must not be understood that we hold the writ as anything more than *prima facie* evidence of the right of the constable to make the levy and take possession of the property. If it in fact belonged to plaintiff, he was entitled to recover upon proving the property to be his. It follows that if the writ of attachment was admissible in evidence when offered by itself, it was equally admissible when offered with the summons, affidavit, etc., in connection with it.

At the trial, plaintiff was sworn as a witness in his own behalf, and gave evidence tending to show that in March, 1882, he was the owner of the property in question and entered into a contract with Flanders to sell to him the property for one thousand dollars, plaintiff to retain the title until the property was paid for; that Flanders paid or secured three hundred dollars of the purchase money. Plaintiff then rented to Flanders a restaurant in which the property was used and gave possession of the personal property to Flanders, who was to pay rent, interest on the purchase money due and to have the personal property when he paid for it. On cross-examination the witness was asked the following question by counsel for defendants: "Describe the property which you sold to Mr. Flanders." Counsel for plaintiff objected to the question upon the ground that it was immaterial and irrelevant. The objection was sustained by the court, and the ruling is assigned as error. Plaintiff's ownership of the property was denied by the answer, and having testified to such ownership and as to a contract of sale to Flanders, under which the latter was placed in possession, it was proper on cross-examination, to inquire as to the precise property included in the transaction. Defendant had a right to show by the witness, if he could, that the alleged contract of sale, was in fact a sale *in presenti*, or that the contract did not include all the goods levied upon, etc. We think the court erred in sustaining the objection.

We find no error, in the other points made by the defendants, upon the refusal of the court to permit the witness to answer questions propounded. Judgment was rendered in favor of the plaintiff for the possession of the property described in the complaint, and for costs, but did not provide for a recovery of its value, as provided by section 667 of the code of civil procedure. The property had already been delivered to plaintiff. Under these circumstances, respondent claims that no injury was done to appellant by a failure to provide in the judgment for a recovery of the value of the property, and his contention seems plausible.

But in Berson v. Nunan, 63 Cal., 550, it was held that in actions to recover personal property, the judgment must be in the alternative form required by section 667 of the code of civil procedure.

We are of opinion the judgment of the court below and the order denying a new trial should be reversed and a new trial had.

BELCHER, C. C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed and cause remanded for a new trial.

[END OF VOLUME VII.]

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ACCOUNT.

1. OPEN ACCOUNT—ACTION ON—ITEMS ACCRUING WITHIN PAST TWO YEARS.—In an action on an account, not reciprocal in its demands, the plaintiff can only recover for items which accrued within the last two years prior to the commencement of suit. *Gwinn, Administrator,* v. *Hamilton, Administrator. Cal.*, 419.

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ACCOUNTING.

1. ACCOUNTING—EVIDENCE REVIEWED.—In an action for an accounting, the evidence reviewed at length, and the decree ordered modified in accordance with the views expressed in the opinion. *Mandaudas* v. *Heilner et al. Or.*, 44.

ACKNOWLEDGMENT.

See DEED, 4.

ACQUIESCENCE.

See BOUNDARIES, 1; ESTOPPEL, 1.

ADMIRALTY.

1. ADMIRALTY—SALVAGE SERVICES—COMPENSATION FOR.—The pleadings of the district court reviewed and held supported by the evidence; and the decree of the district court affirmed. *Queen of the Pacific.* (*U. S. Cir. Ct.*) *Or.*, 711.

See ASSAULT AND BEATING, 1.

ADVERSE POSSESSION.

1. ADVERSE POSSESSION, TITLE VESTED UNDER.—Adverse possession of land, for the period prescribed by the statute of limitations, vests a perfect title in the possessor as against the former holder of the title and all the world, and entitles him to all the remedies at law or in equity which are incident to possession under written titles. *Parker* v. *Metzger et al. Or.*, 153.

2. GROWING CROPS—ADVERSE POSSESSION—ATTACHMENT.—Crops raised upon land in the actual, exclusive and adverse possession of a third person, cannot be attached at the suit of a creditor of the legal owner of the land. *Smith et al.* v. *Cunningham. Cal.*, 215.

3. APPROPRIATION OF WATER—STATUTE OF LIMITATIONS—EVIDENCE IN REBUTTAL.—The plaintiff claimed ownership of a certain water right; the defendant denied such ownership, and set up title under the statute of limitations; the plaintiff proved a prior appropriation of the water right, in himself. *Held*, that, in order to meet the defense of the statute of limitations, evidence that the defendant, before any bar of the statute could have attached, had acknowledged the plaintiff's claim, and sought to become his lessee of the water right, was relevant and admissible in rebuttal. *Ledu* v. *Jim Yet Wa. Cal.*, 293.

4. THE SAME—INSTRUCTIONS.—In such action, it is error for the court to instruct the jury that they might find for the plaintiff without taking into consideration the defense of adverse possession. *Id.*

5. HOMESTEAD—LEASE AND DEED OF BY HUSBAND—HUSBAND OR TENANT CANNOT HOLD ADVERSELY—POSSESSION—NOTICE.—Plaintiff and her husband, on the thirty-first of August, 1860, jointly executed a declaration of homestead on the land in controversy, and continued to reside thereon until 1867. On September 27, 1871, the husband executed a lease of the premises to defendants for a term of two years from February 8, 1872. This lease was duly acknowledged and recorded June 11, 1872. On that day the husband executed and delivered to defendants a second lease of the same premises for a term of ten years from January 1, 1874, lease acknowledged and recorded June 11, 1872. On the twenty-fifth day of October, 1876, said husband executed to defendants a deed of conveyance of all the land in question, which deed was duly acknowledged and delivered by the grantor, but never recorded. On the twenty-second day of January, 1880, said husband executed and delivered to defendants a third lease of the same premises for a term of ten years from date. The lease was signed and acknowledged by defendants also, and duly recorded at request of defendant Clarke, January 31, 1880. No consideration was actually paid therefor. The plaintiff herein was not a party to either or any of the leases, or to the deed of conveyance, and had no knowledge of the execution, or existence of said deed, until after the death of her husband, in 1882. Defendants entered into possession under their first lease, and have ever since retained such possession, using the land for grazing and other purposes, of which possession by defendants, plaintiff was cognizant. *Held*, that until the delivery of the deed, the defendants, as tenants of the husband, were estopped from denying his title; that the *locus in quo* being a homestead, the husband could not hold the same adversely to his wife, and, consequently, the defendants could not claim adversely to her; that the defendants, having entered into possession under the leases, could not claim adversely to her, during the continuance of the terms, as she never had any actual or constructive notice of the defendants' deed, or possession begun thereunder. *Mauldin* v. *Cox et al.* *Cal.*, 381.

6. ADVERSE POSSESSION—ESSENTIAL ELEMENTS OF—STATUTE OF LIMITATIONS.—An essential element of the adverse possession which will set the statute of limitations in motion is, that it be open and notorious, as well as continuous; it must be of such a character as to operate as a notice to the holder of the true title that possession is held under a claim of right. The acts of the possessor should indicate clearly that he holds, not for the true owner or in subordination to his title, but for himself and in opposition to such owner. The acts should be such as, when proven or admitted, will establish an *ouster* of the owner. He must be entitled to maintain an action before the statute of limitations will run against him. He has a right, also, to be reasonably informed of the claim set up against him, either by acts or words, before the statute will run, and if the acts of the party in possession are of such a character as reasonably to indicate to the owner that the holding is not adverse, but in subordination to the title, the statute will not run. *Id.*

See STATUTE OF LIMITATIONS, 1-7; WATER AND WATER RIGHTS, 9.

AFFIDAVIT.

See APPEAL, 7, 8; SUMMONS, 1.

ALASKA.

1. ALASKA NOT AN INDIAN COUNTRY—OFFENSE AGAINST INDIAN—JURISDICTION OF DISTRICT COURT. — The territory of Alaska is not "Indian country," within the meaning of that term, as used in the acts of congress; and, consequently, the district court of the district of Alaska has jurisdiction to try an Indian for an offense committed by him against another Indian in such territory, prior to the act of March 3, 1885. *United States* v. *Kie.* (*U. S. Dist. Ct.*) *Alaska*, 6.

See JURISDICTION, 2, 4.

ALIEN.

1. ALIEN, WHO IS—MAY INHERIT PROPERTY.—A person born in Ireland, who has always resided there, and never been in the United States, is an alien, and as such is entitled to inherit property in this state. *Lyons et al.* v. *State of California.* *Cal.* 355.

2. THE SAME—NEED NOT COME IN PERSON TO CLAIM PROPERTY.—Under sections 672 and 1,404 of the civil code, and 1,272 of the code of civil procedure, a non resident alien can take property in this state by succession, although he does not come here in person to claim the same. *Id.*

3. NON RESIDENT ALIEN MAY ASSIGN RIGHTS IN INHERITANCE.—A non resident alien may sell his interest in the property of an estate, which he has inherited, and his assignee may appear and claim it, under section 1,272 of the code of civil procedure. *Carrasco* v. *State of California.* *Cal.*, 374.

ALIMONY.

See DIVORCE, 1.

AMENDMENT.

1. POSTPONEMENT OF TRIAL—AMENDMENT TO ANSWER—DISCRETION.—It is within the discretion of the court to refuse a second postponement of the trial, or to refuse an amendment to the answer asked for at the trial. *Levy* v. *Baldwin.* *Cal.*, 215.

2. AMENDMENT TO PLEADINGS—DISCRETION—ABUSE OF.—The allowance of amendments to pleadings is, in general, largely in the discretion of the trial court, but, under the circumstances of this case, and especially from the fact that the attorney for the plaintiff received a copy of the amended answer as filed, without objection or protest, until after the trial had commenced, *held*, that the discretion of the trial court, in refusing to allow the defendant to amend its answer, had been abused. *Lower King's R. W. D. Co.* v. *King's R. & F. C. Co.* *Cal.*, 600.

3. AMENDMENT—STRIKING OUT NAME OF DEFENDANT—JUDGMENT OF DISMISSAL.—A plaintiff, who consents to an amendment, striking out the name of a party defendant, is entitled, after a demurrer has been filed for the non-joinder of such party, to have him made a party by an order of court. Such judgment of dismissal is not a judgment upon the merits, under section 151 of the practice act, and not a bar to further proceedings. *James* v. *Leport.* *Nev.*, 543.

See JUDGMENT, 6, 7; REMOVAL OF CAUSES, 2.

APPEAL.

1. APPEAL FROM SEVERAL ORDERS ON SAME SUBJECT.—An appeal from several orders made in insolvency proceeding, all relating to the same subject, will be considered as one appeal, requiring but one undertaking. *Edgecomb* v. *His Creditors.* *Nev.*, 97.

2. APPEAL FROM RECORDER'S COURT—CITY OF CORVALLIS.—An appeal lies from the recorder's court of the city of Corvallis, in adjudications upon city ordinances. The decision in Sellers v. Corvallis, 5 Or., 273, followed, but not approved. *City of Corvallis* v. *Stock.* *Or.*, 115.

3. JUDGMENT—APPEAL—EXECUTION SALE—TRESPASS — DAMAGES.—Under section 356 of the code of 1877, an appeal by one of two judgment debtors stays all proceedings on the judgment. If, however, pending such appeal, property of the judgment debtor be sold, under such judgment, and the execution sale be ratified by the debtor, the only damages he can recover in an action for the taking of such property, is the difference between its real value and the amount for which it was sold upon the execution. *McCoy* v. *Wilson.* *Col.*, 94.

4. APPEAL FROM ORDER MADE AFTER JUDGMENT—STAY OF EXECUTION ON JUDGMENT.—On an appeal from an order made after final judgment when no appeal is taken from the judgment the supreme court has no power, under section 949 of the code of civil procedure, to order a stay of execution on the judgment not appealed from. *Carr* v. *Charles et al.* *Cal.*, 605.

5. ENTRY OF JUDGMENT ESSENTIAL TO APPEAL.—An appeal from the judgment cannot be considered if the record shows no entry of it. *Meysan* v. *Chabrie.* *Cal.*, 213.

6. MOTION TO VACATE JUDGMENT — PAPERS USED ON MUST BE AUTHENTICATED.—An order on a motion to vacate a judgment by default, will not be reversed on appeal when the record contains no authentication of any papers or documents used on the hearing of such motion. *Id.*

7. AN AFFIDAVIT CANNOT BE CONSIDERED ON APPEAL, if it be not contained in the statement or bill of exceptions. *Clanton* v. *Coward.* *Cal.*, 363.

8. MOTION TO DISSOLVE ATTACHMENT—AFFIDAVITS MUST BE IDENTIFIED.—Affidavits used on a motion to dissolve an attachment, are not part of the judgment roll, and will not be considered on appeal, unless embodied in a bill of exceptions, or indentified by the clerk. *Browring* v. *Browring*. *Utah*, 379.

9. STATEMENT ON APPEAL—CERTIFICATION OF.—A statement of facts, in an appeal taken under the act of 1883, must be certified as containing all the material facts in the cause. Otherwise, it will be stricken out. *Collins* v. *City of Seattle*. *Wash.*, 461.

10. AN ASSIGNMENT OF ERROR WILL NOT BE CONSIDERED, unless it has been served upon the adverse party, or his attorney. *Id.*

11. STATEMENT ON APPEAL—MUST CONTAIN ALL OF EVIDENCE.—When the statement on appeal does not purport to contain all the evidence, the appellate court will not consider an objection that the findings are not sustained by the evidence. *Cullum* v. *Paul*. *Ariz.*, 702.

12. APPEAL UNDER ACT OF 1883—EVIDENCE, HOW BROUGHT UP.—Where a case is appealed, under the act of 1883, the evidence taken in the lower court, must be brought up in compliance with the provisions of that act. *Meeker* v. *Gardella et al.* *Wash.*, 458.

13. CRIMINAL LAW—APPEAL—JURISDICTION MUST APPEAR OF RECORD.—In criminal cases, the jurisdiction of the supreme court must be determined from the record, and not from extraneous matters. *People* v. *Fennel*. *Utah*, 249.

14. DISMISSAL OF APPEAL—PERFECTING APPEAL.—After an appeal has been dismissed for want of jurisdiction appearing on the record, the appellant will not be permitted to send to the court below and perfect his appeal, when no such request was made on the motion to dismiss the appeal. *Id.*

15. APPEAL—DISMISSAL—ASSIGNMENT OF ERRORS.—An appeal in an action at law, brought under the act of 1883, will be dismissed if the plaintiff in error fails to serve a copy of assignment of errors on the adverse party within the time limited by rule 5, of the supreme court. *Parker* v. *D'Acres*. *Wash.*, 457.

16. AN APPEAL WILL BE DISMISSED IF THE NOTICE THEREOF IS NOT SIGNED by the attorney of record of the appellant. *Harrigan* v. *Bolte*. *Cal.*, 629.

17. APPEAL—NOTICE OF MUST BE SERVED.—In the absence of a voluntary appearance, an appeal by one of two beaten parties is ineffectual, unless the notice of appeal be served on the other. *Parker et al.* v. *Denny*. *Wash.*, 545.

18. THE SAME—CERTIFICATE THAT WHOLE OF EVIDENCE IS IN TRANSCRIPT.—The supreme court does not obtain jurisdiction of an appeal unless the transcript contains a certificate that the whole of the evidence is embodied in it. *Id.*

19. APPEAL—NOTICE OF MUST BE SERVED ON ALL ADVERSE PARTIES—PARTITION.—An appeal from an interlocutory decree in partition will be dismissed, if the notice thereof was not served upon all of the adverse parties. *Luco* v. *Commercial Bank of San Diego*. *Cal.*, 710.

20. AN APPEAL WILL BE DISMISSED IF THE TRANSCRIPT FAILS TO SHOW that notice of appeal was filed with the clerk of the court in which the judgment appealed from was entered. *Sayward* v. *Guye et al.* *Wash.*, 459.

21. JUDGMENT—NOTICE OF APPEAL—ENTRY OF.—Where judgment and notice of appeal are entered in the journal of the court upon the same day, it will be presumed that the notice of appeal was not given until after judgment. *Puget Sound Iron Company* v. *Worthington Bros.* *Wash.*, 462.

22. DISMISSAL OF APPEAL—ASSIGNMENT OF ERRORS.—An appeal will not be dimissed on the ground that no assignment of errors has been made or served, if the record contains a proper assignment of errors, with a proper return of service, although the clerk omitted to mention such assignment in his certificate to the transcript. *Id.*

23. STATEMENT OF FACTS MAY INCLUDE EXCEPTIONS TAKEN AT TRIAL.—A statement of facts, in an appeal under the act of 1883, may include everthing material that transpired in the cause, nor otherwise a part of the record. Exceptions reserved, need not be embodied in a regular bill of exceptions. *Id.*

24. THE SAME—NOTICE OF SETTLEMENT OF STATEMENT.—Under such act, the party giving notice for the settlement of the statement of facts, need not serve upon the adverse party a copy of the proposed statement. *Id.*

25. INSTRUCTIONS WILL NOT BE CONSIDERED ON APPEAL, unless they are contained in the statement of facts, or in a bill of exceptions. *Id.*

26. A STATEMENT OF FACTS MUST BE CERTIFIED OR IDENTIFIED as the statement of facts in the cause, otherwise it will be stricken from the transcript. *Id.*

27. MANDAMUS AGAINST COUNTY AUDITOR—UNDERTAKING ON APPEAL BY DEFENDANT MAY BE DISPENSED WITH.—In proceedings for a writ of mandate against a county auditor, to compel him to issue a warrant upon the county treasurer, for the payment of a certain sum of money, the defendant does not act in his individual capacity; and in an appeal by him to the supreme court, the court may, under section 946 of the code of civil procedure, dispense with an undertaking on appeal. *Scheerer* v. *Edgar, Auditor, etc. Cal.*, 365.

28. CRIMINAL LAW—ORDER GRANTING NEW TRIAL—APPEAL.—An order granting a defendant a new trial, in a criminal case, will not be disturbed on appeal, unless the prosecution makes a very plain showing. *People* v. *McGinn. Cal.*, 362.

29. TRANSCRIPT ON APPEAL—TIME FOR FILING.—A transcript on appeal, filed on August 5, 1885, is filed within the time limited by rule 2 of the supreme court, when the notice of appeal was filed on June 3, the bill of exceptions settled on July 1, and filed on July 2. *Horton* v. *Dominguez. Cal.*, 709.

30. APPEAL HELD WITHOUT MERIT, and motion to dismiss denied. *Parker* v. *Bernal et al. Cal.*, 214.

See APPEARANCE, 1; COSTS, 2; DIVORCE, 1; FINDINGS, 3; HABEAS CORPUS, 1; INJUNCTION, 4; INSOLVENCY, 6, 7; JUSTICE'S COURT, 1-5; NEW TRIAL, 4, 12; REMOVAL OF OFFICER, 1.

APPEARANCE.

1. GENERAL APPEARANCE—NOTICE TO DISMISS APPEAL.—A brief, in which appellees call attention to the nature of the action, to the character of the process by which the action is brought to the supreme court, and which contains a notice that the appellees will move to dismiss the appeal for the reasons stated, will not be construed as a general appearance. *Wilson* v. *Ward et al. Wash.*, 460.

ASSAULT AND BEATING.

1. ADMIRALTY RULE 16—ASSAULT AND BEATING—REMEDY FOR IS IN PERSONAM.—Under admiralty rule sixteen, the ship cannot be proceeded against *in rem*, in any case the *gravamen* of which is an assault or beating. The remedy, in such case, is by an action *in personam* against the owners. *Smith et al., Libellants* v. *The Ship "Challenger." Wash.*, 486.

ASSIGNMENT.

1. ASSIGNMENT OF CHOSE IN ACTION—ASSIGNEE MAY SUE—AMOUNT OF RECOVERY.—If a chose in action is transferred by an assignment absolute in form, though as security only, for a debt less in amount than the sum due, or to become due, upon the instrument assigned, the assignee may sue thereon in his own name, and is not limited to recover only the sum due him from the assignor, but may recover the whole amount due thereon, being in turn responsible to his assignor for any excess. *Ginocchio* v. *Amador C. & M. Co., and Bright et al., Intervenors. Cal.*, 525.

2. THE SAME—INSTRUMENT SUED ON CONSTRUED.—The instrument in suit was an agreement between the defendant and the Moore Mining Company, by the terms of which the defendant agreed to furnish water to the mining company for five years, to run a quartz mill, at a fixed price per inch, to be supplied through a ditch to be constructed by the mining company. The latter was to be paid the expense of building the ditch, by the defendant, in water, and in case working the quartz mill was abandoned before such payment was received the defendant was to pay the expense of building the ditch, in cash, from the net proceeds of water run through and sold from such ditch. The ditch was constructed and delivered to the defendant. Before the mining company had been paid, it abandoned working the quartz mill. *Held*, that the ditch was the property of the defendant, and not an appurtenant to the quartz mill; that the rights of the mining company, under the contract, were assignable, and had been properly assigned to the plaintiff. *Id.*

3. CONTRACT—ASSIGNMENT OF INDEBTEDNESS—ORDER.—Appellants held a contract for grading on a railroad. They sublet a part thereof to one Chaffin, and he sublet a

part of his sub-contract to the respondent, McBride. Upon the completion of his work, McBride applied to Chaffin for his pay. As the contract price of his work was the same as the price Chaffin was to get from appellants, Chaffin agreed to sign over to McBride the amount he was to be paid for that work. The appellants were notified of this arrangement, and assented to it. In pursuance thereof, the following order was executed:

"CHAFFIN'S CAMP, O. S. L. R. R., IDAHO.

"C. W. COLLINS & Co.: Please pay to R. H. McBride for grading from station 4,166 to station 4,205, on the 293d mile of the Oregon Short Line Railroad, less three hundred and thirty-seven dollars and thirty-four cents, and book account, and oblige H. A. CHAFFIN."

Held, That such order was an assignment of the indebtedness due Chaffin; that it was not indefinite, for failing to state the specific sum to be paid. *McBride* v. *Collins et al. Utah*, 247.

See ALIEN, 3; CONTEMPT, 6.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. ASSIGNEE FOR BENEFIT OF CREDITORS—MAY SUE IN OWN NAME.—An assignee for the benefit of creditors can maintain an action, in his own name, to recover possession of the property assigned; he is not required to sue as assignee. *Collum* v. *Paul. Ariz.*, 702.

2. ASSENT OF CREDITORS PRESUMED TO ASSIGNMENT.—In the absence of evidence of dissent, the assent of creditors is presumed to a general voluntary assignment for their benefit, without preference or restrictions. *Id.*

3. A FINDING THAT A PERSON WAS INSOLVENT, presupposes that he has creditors. *Id.*

4. ASSIGNMENT FOR BENEFIT OF CREDITORS PASSES PROPERTY IN ANOTHER STATE.—A voluntary assignment for the benefit of creditors which is valid in the state where the owner resides, will be held to pass personal property included, the *situs* of which is in another. *Campbell* v. *Col. C. & I. Co. Col.*, 32.

5. THE SAME—ASSIGNMENT MUST INCLUDE ALL PROPERTY.—A voluntary assignment for the benefit of creditors, under section 68 of the general statutes, must include the entire estate of the insolvent, otherwise it is invalid. This rule applies although the property omitted from the assignment is situated in another state. *Id.*

ATTACHMENT.

See ADVERSE POSSESSION, 1; APPEAL, 8; CLAIM AND DELIVERY, 1.

ATTORNEYS.

1. DISBARMENT OF ATTORNEY—PREVIOUS CONVICTION OF CRIME NOT NECESSARY—POWER OF SUPREME COURT.—The supreme court has power, under section 287 of the code of civil procedure, to disbar an attorney for official misconduct, in fraudulently appropriating to his own use moneys collected by him for his client. In the exercise of this power the court deals with the attorney only as an officer of the court in investigating charges against him for the purpose of determining whether, under the proofs, he is a fit person to be allowed to continue to practice as an attorney and counselor in the courts, under the license which has been granted him, and not for the purpose of adjudging whether he is guilty of the commission of a crime for which he ought to be convicted and punished. That can only be done in a criminal court of competent jurisdiction by due process of criminal law. Previous conviction of a crime is not necessary to a proceeding to disbar an attorney. *In re W. B. Treadwell. Cal.*, 283.

2. THE SAME.—The evidence reviewed and held that the respondent was guilty of professional misconduct as charged. *Id.*

3. ATTORNEY WRONGFULLY WITHHOLDING PROPERTY OF CLIENT—DISBARMENT.—An attorney who receives, in his official capacity, any money or property belonging to his client, and, upon demand therefor and tender of his fees, refuses or neglects to pay over the same, will be disbarred, under section 74 of the general statutes, although, after the institution of proceedings for disbarment, he may have paid the money wrongfully withheld. *People ex rel. Whittemore* v. *Ryalls. Col.*, 23.

4. DISBARMENT OF ATTORNEY—SWEARING TO LEGAL EFFECT OF STIPULATION.—On January 7, 1885, the supreme court made an order, referring the settlement of a bill of exceptions to a certain judge. Subsequently, the attorneys for the parties interested, of whom the respondent was one, entered into a stipulation for the continuance of the hearing of the settlement of the bill of exceptions. Thereafter a motion was made in the supreme court to set aside the order of reference of January 7, 1885. That motion was contested by the respondent, who filed an affidavit in which he stated that it had been stipulated that the bill of exceptions should be settled by the judge. On the argument of the motion the respondent, in reply to a suggestion that the stipulation was, or might have been, a stipulation merely to continue the hearing, replied: "No; the stipulation is as stated in the affidavit." *Held*, that the evidence did not show that the respondent intentionally made a false statement for the purpose of misleading the court, and that, consequently, he ought not to be disbarred. *In re Disbarment of Houghton. Cal.*, 557.

5. THE PRACTICE OF SWEARING TO THE LEGAL EFFECT OF WRITTEN STATEMENTS, in the form of a positive averment, commented upon and condemned. *Id.*

See CONTEMPT, 5; CORPORATIONS, 7.

BALLOT.

See ELECTION, 1-5.

BONDS.

See MONTGOMERY AVENUE BONDS.

BOUNDARIES.

1. BOUNDARIES—ACQUIESCENCE IN DIVISION LINE—PAROL AGREEMENT TO CHANGE—STATUTE OF FRAUDS.—Where two adjoining owners of land agree upon their boundary line, and a division fence is erected upon the same and acquiesced in, and possession held in accordance therewith, for a sufficient length of time to create a title by adverse possession, a subsequent parol agreement between the owners, by which a surveyor was employed to run the division line between them, which line was, thereafter, to constitute the boundary, is within the statute of frauds, and not binding. *Sharp* v. *Blankenship. Cal.*, 428.

2. DIVISION FENCE—ADJOINING PROPRIETORS—PRESCRIPTION—ESTOPPEL.—Adjoining owners of land, who erect a division fence along their supposed boundary line, under an agreement that, upon the discovery of the true boundary, the fence shall be changed so as to comply therewith, acquire no rights as against each other, by reason of the erection of such fence, either by prescription or estoppel, until the true boundary has been determined. *Quinn* v. *Windmiller. Cal.*, 518.

See ESTOPPEL, 1.

BRIBERY.

See ELECTION, 7.

BRIEFS.

See APPEARANCE, 1; POINTS AND AUTHORITIES.

BURGLARY.

1. CRIMINAL LAW—BURGLARY—PETIT LARCENY—PRIOR CONVICTION.—The defendant was accused, by information, of the crime of burglary, and was convicted of burglary in the first degree, and sentenced to fifteen years' imprisonment in the state prison. The information contained a charge that the defendant had been previously convicted of petit larceny. On the trial the defendant pleaded guilty of such charge, and no evidence was introduced to prove the same, nor any verdict rendered thereon. *Held*, that upon the conviction for burglary in the first degree, the defendant might have been sentenced to fifteen years in the state prison independent of the former conviction for petit larceny; that the proceedings as to petit larceny may be disregarded, and the judgment stand. People v. King, 12 Pac. Coast Law Jour., 322, distinguished. *People* v. *Mason. Cal.*, 172.

CANCELLATION.

See EVIDENCE, 13.

CERTIORARI.

1. WRIT OF REVIEW—JURISDICTION.—A writ of review does not lie to review the action of a court, in a proceeding in which it had acquired jurisdiction. *Hines* v. *Roadhouse, Justice of the Peace.* *Cal.*, 422.

2. SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS—WRIT OF REVIEW.—Where an order settling the first annual account of an administrator has been made, a subsequent order that such account should be again gone into in connection with the administrator's second annual account, cannot be reviewed on a writ of review. *Hirschfeld* v. *Superior Court of Tulare County.* *Cal.*, 709.

CHECK.

1. ACTION ON CHECK—DEMAND AND NOTICE MUST BE ALLEGED.—In the complaint against the drawer of a bank check or bill of exchange, it is necessary to aver either demand and notice to the drawer of non-payment, or such facts as would excuse demand and notice. *Dowling* v. *Hunt* *Ariz.*, 18.

See CONSPIRACY, 2.

CHINESE RESTRICTION ACT.

1. CHINESE RESTRICTION ACT—CHINESE DENIED RIGHT TO LAND—HABEAS CORPUS.—A Chinese person, on board of a vessel recently arrived at the port of San Francisco, from which he is not permitted to land, is restrained of his liberty within the meaning of the *habeas corpus* act, and is entitled to have the lawfulness of such restraint inquired into and determined on *habeas corpus.* *In re Jung Ah Lung, on Habeas Corpus; In re Jung Ah Hon, on Habeas Corpus.* (*U. S. Dist. Ct.*) *Cal.*, 698.

2. THE SAME—COURT NOT BOUND BY DETERMINATION OF COLLECTOR.—The fact that the collector of the port, acting under the direction of section 9 of the Chinese restriction act of 1882, has already investigated and passed upon the petitioners' right to land, does not deprive the court of jurisdiction to determine whether such restraint is lawful. *Id.*

See HABEAS CORPUS, 1, 2.

CHOSE IN ACTION.

See ASSIGNMENT, 1, 2.

CLAIM AND DELIVERY.

1. CLAIM AND DELIVERY—JUSTIFICATION OF TAKING UNDER ATTACHMENT.—In an action of claim and delivery, where the property in dispute was found in the possession of a third person, and was levied upon by the defendant, as constable, under a writ of attachment against him, regular upon its face, issued by a justice of the peace having jurisdiction of the subject matter, and in a case where, under the law, he was authorized to issue the same, such writ is admissible in evidence in justification of the act of the officer in making the levy, together with the summons, affidavit, etc., in connection with it. *Brichman* v. *Ross.* *Cal.*, 748.

2. THE SAME—EVIDENCE OF OWNERSHIP—CROSS-EXAMINATION.—In such action, where the answer denies the plaintiff's ownership, and the plaintiff has given evidence tending to establish the same, and that the property in question was in possession of the attachment debtor, under a contract of sale, the defendant has a right to show, on cross-examination of the plaintiff, that the alleged contract of sale was, in fact, a sale *in præsenti*, or that the contract did not include all the goods levied upon, etc. *Id.*

3. THE SAME—JUDGMENT MUST BE IN ALTERNATIVE.—In such action, a judgment in favor of the plaintiff must be in the alternative form, required by section 667 of the code of civil procedure, although the property has already been delivered to the plaintiff. *Id.*

CONSIDERATION.

See DEED, 3; EVIDENCE, 13; GUARANTY, 1; SALE, 7; TRUSTS, 2.

CONSPIRACY.

1. CONSPIRACY—INFORMATION FOR NEED NOT BE AGAINST CONSPIRATORS JOINTLY.—An information for conspiracy is not insufficient because it is against a single individual, and the name is given of the person with whom he is charged to have conspired. *People* v. *Richards*. *Cal.*, 399.

2. CONSPIRACY TO ROB ANOTHER OF BANK CHECK.—A conspiracy to compel one to sign a bank check, and then to take it from him by force, is a conspiracy to rob. *Id.*

CONTEMPT.

1. THE JURISDICTION OF THE UNITED STATES COURTS, of offenses committed in places in California purchased by the United States, by the consent of the legislature of the state, for a custom house, andother needful buildings, and used for such buildings, is exclusive. *Sharon* v. *Hill*. (*U. S. Cir. Ct.*) *Cal.*, 229.

2. DEADLY WEAPONS—CONTEMPT AND OFFENSES.—The drawing of a pistol, and threatening the lives of counsel, in the presence of an examiner in chancery while taking testimony in an equity case, pending in the United States circuit court, in the chambers of the judge adjoining the court room, situate upon land thus under the exclusive jurisdiction of the United States, is both a contempt of court, punishable as such, and an offense under the statutes of the United States, punishable on indictment, or information. *Id.*

3. CONTEMPT OF COURT—OFFENSES UNDER THE STATUTE.—Where the same acts constitute offenses against the United States, punishable upon information, or indictment, and at the same time a contempt of court, punishable as such, and there is no special end, in the administration of justice, to be accomplished by proceeding, summarily, on process for contempt, the court may waive the process for contempt, and leave the government to proceed to punish the offense under the statute. *Id.*

4. ARMED ATTORNEYS.—The going into court, by members of the bar, armed with deadly weapons, characterized as not only a contempt of court, but, also, *professional misconduct*, that ought to be punished by suspension from practice or disbarment. *Id.*

5. CONTEMPT—VIOLATION OF INJUNCTION—AFFIDAVIT—CORPORATIONS.—An affidavit on which contempt proceedings were based, for violating an injunction which had been issued and served, restraining a corporation, its officers, agents, superintendents, managers, servants and employees, from the commission of certain acts, did not state that the defendants were officers, agents, etc., of the corporation; it did state that they had full knowledge of the issuance, service and effect of the injunction, that they did the acts complained of in violation thereof, and in contempt of the court issuing it. *Held*, that the affidavit was sufficient. *Hedges et al.* v. *Superior Court of Yuba County*. *Cal.*, 373.

6. SATISFACTION OF JUDGMENT—ASSIGNMENT—CONTEMPT.—A judgment debtor cannot be proceeded against for contempt, at the instance of a person not a party to the suit, claiming under an alleged prior assignment of the judgment, the priority of which is disputed, when a satisfaction of the judgment by the plaintiff in the action is on file and of record. *Ex parte Tittel, on Habeas Corpus*. *Cal.*, 214.

CORPORATIONS.

1. CORPORATION—CHAIRMAN MAY ACT AS SECRETARY OF MEETING.—The fact that the chairman of a meeting of the board of trustees of a corporation acted also as its secretary, and kept the minutes of the meeting, neither invalidates the action of the meeting, nor the minutes of that action as taken down and recorded by him. *Budd et al* v. *Walla Walla Printing and Publishing Co.* *Wash.*, 546.

2. THE SAME—MEETING PRESUMED TO BE REGULAR—NOTICE.—Every meeting of the board of trustees of a corporation, to be valid, must be regular; that is, must be stated meetings, or meetings called pursuant to authoritative notice. Yet, it does not follow, that when the meeting is not a stated one, proof or recital of notice must appear on the face of the record. Any needed proof of the regularity of the

meeting may be supplied *aliunde*, and until the contrary appears, the proceedings will be presumed regular. *Id.*

3. THE SAME—CONTRACT IN FAVOR OF TRUSTEE—TRUSTEE VOTING IN FAVOR OF.—An evidence of indebtedness, executed by a corporation, to one of its trustees, in pursuance of the unanimous vote of the board of trustees, is not void, in the absence of evidence of fraud, simply because the trustee in whose favor it was made, was present at the meeting, and voted for the same. *Id.*

4. CORPORATIONS—ELECTION OF DIRECTORS—ACTION TO SET ASIDE—STOCKHOLDER MAY MAINTAIN.—A stockholder in a corporation may institute an action to set aside an election for directors, although he has not had stock standing in his name on the books of the company for a sufficient length of time to entitle him to vote at such election, under section 312 of the civil code. *Wright* v. *Central California Colony Water Company*. *Cal.*, 573.

5. THE SAME—SUPERIOR COURT HAS JURISDICTION OF ACTION.—The superior court, sitting as a court of equity, has jurisdiction to inquire into the validity of an election for corporate directors, and to set it aside, if it was not made in conformity with law, although such jurisdiction has not been expressly conferred upon it by statute. *Id.*

6. THE SAME—MANNER OF VOTING AT ELECTION—RIGHT OF CUMULATIVE VOTING.—Under section 12 of article xii. of the constitution, each qualified stockholder, present at an election for directors of a corporation, has the right in exercising his power of voting for directors, to vote, at one time, the whole number of shares in his name, for the whole number of directors to be elected, or to cumulate his shares, by voting for one candidate for director as many votes as shall equal the number of his shares, multiplied by the number of directors to be elected, or by distributing them, upon the same principle, among as many creditors for directors as he shall think fit And an election at which the stockholders are denied the right to thus cumulate their votes is illegal and will be set aside. *Id.*

7. CORPORATION—AUTHORITY OF PLAINTIFF'S ATTORNEY CANNOT BE QUESTIONED BY DEFENDANT.—An action by a corporation, brought and prosecuted by an attorney, is presumed to have been instituted by the consent of the plaintiff; and until the attorney's want of authority to appear for his client is shown, the defendant will not be permitted to have the action dismissed by showing that the plaintiff does not desire to maintain it. *Boston T. Co.* v. *McKenzie*. *Cal.*, 528.

8. CORPORATIONS—COPY OF COPY OF ARTICLES OF INCORPORATION—EVIDENCE.—Under section 299 of the civil code, a certified copy of the certified copy of articles of incorporation, required to be filed with the county clerk, in order to enable a corporation to maintain certain actions, is not in any sense secondary evidence, but is equal, in all respects, with the original, as evidence. *Id.*

9. OFFICIAL CHARACTER—PAROL EVIDENCE OF.—The fact that a witness was a *de facto* officer and stockholder in a corporation may be shown by parol. *Id.*

10. RIGHT OF CORPORATION TO HOLD REAL ESTATE PRESUMED.—In the absence of evidence to the contrary, a corporation is presumed to have the right to purchase and hold lands. *People* v. *La Rue*. *Cal.*, 581.

11. DISCRIMINATION BY RAILWAY CORPORATION.—Notwithstanding the Hoult act, a railway corporation may charge less for a long haul than a short one in the same direction when the rate for the long haul is caused by other lines of transportation competing for business at the point from whence the long haul is made; and where the road of such corporation forms a part of a line of transportation, consisting largely of water carriage, between two principal points, the rate may be made so as to enable it to compete with another road that constitutes a part of another line of water and railway transportation between the same points. *Ex parte Koehler, Receiver, etc.* (*U. S. Cir. Ct.*) *Or.*, 695.

12. PROVISO TO SECTION 2 OF THE HOULT ACT.—Under this proviso, which excepts from the operation of the act, "goods intended in good faith to be shipped to points beyond the limits of the state," wheat intended by the shipper to be sent directly to San Francisco, or other points beyond the limits of the state, via Portland, may be carried on the O. & C. road from Corvallis to the latter place without reference to said act. *Id.*

13. CORPORATIONS—JUDGMENT CREDITOR—LIABILITY FOR UNPAID SUBSCRIPTION.—A judgment creditor of a corporation may maintain an action against a stockholder,

to recover the amount of the latter's unpaid subscription to the corporate stock, without having made any effort to induce the corporation to make a call for such subscription. *Thompson* v. *Reno Savings Bank et al.* *Nev.*, 495.

14. THE SAME—STATUTE OF LIMITATIONS, WHEN COMMENCES TO RUN.—The liability of a stockholder of a corporation for unpaid subscriptions is continuing, and the statute of limitations does not commence to run against the same until it has been set in motion by some adverse action, such as a call by the corporation. *Id.*

See COUNTIES, 2; EXCEPTIONS, 2; GUARANTY, 1.

COSTS.

1. COSTS—FINAL HEARING IN EQUITY—SECTION 824 REVISED STATUTES CONSTRUED.—To constitute "a final hearing in equity or admiralty," within the meaning of section 824, R. S., there must be a hearing of the cause on its merits; that is, a submission of it to the court, in such shape as the parties choose to give it, with a view to a determination whether the plaintiff or libellant has made out the case stated by him in his bill or libel, as the ground for the permanent relief which his pleading seeks, on such proof as the parties place before the court, be the case one of *pro confesso* on bill, or libel and answer, or pleadings alone, or pleadings and proofs. *Mecartney* v. *Crittenden et al.* (*U. S. Cir Ct.*) *Cal.*, 159.

2. MOTION TO TAX COSTS—ORDER ON AFTER JUDGMENT—APPEAL.—A motion to tax a cost bill is a special motion, and an order thereon is a special order, and if made subsequent to the rendition and entry of final judgment, can only be reviewed in the supreme court by a direct appeal therefrom. *Empire G. M. Co.* v. *Bonanza G. M. Co.* *Cal.*, 395.

See SLANDER, 2.

COUNTER CLAIM.

1. A COUNTER CLAIM, TO BE EFFECTUAL, MUST BE DENOMINATED as such in the answer. *Carpenter* v. *Hewel et al.* *Cal.*, 732.

2. EJECTMENT—USE AND OCCUPATION—RENT—COUNTER CLAIM.—In an action of ejectment, a cause of action existing in favor of the defendant against the plaintiff for rent, for the use and occupation of the demanded premises, cannot be set up as a counter claim, as it does not arise out of the transaction, nor is it connected with the subject of the action, set forth in the complaint. *Id.*

COUNTIES.

1. COUNTIES—LIABILITY TO BE SUED—PRESENTATION AND REJECTION OF CLAIMS.—The liability of a county to be sued on an account, after its presentation to and rejection by the board of supervisors, has not been affected by the act of February, 12, 1881. *Smith & Co.* v. *County of Mohave.* *Ariz.*, 607.

2. COUNTIES ARE CORPORATIONS SUBJECT TO BE SUED.—Section 4,000, political code, constitutes counties corporations, and sections 4,002-3 authorize them to be sued. *Nash* v. *El Dorado County.* (*U. S. Cir. Ct.*) *Cal.*, 1.

3. COUNTY CANNOT DELEGATE POWER TO COMPROMISE SUIT—ULTRA VIRES.—Under sections 4,000, 4,001, 4,003 and 4,046 of the political code, the board of supervisors of a county have power to contract for the collection of the property of the county; but in the exercise of that power, it has no authority to delegate to others, whom it employed for that purpose, the power to determine whether to commence a suit in the name of the county, and to select and employ attorneys to commence and prosecute such a suit, nor to abdicate its control of the prosecution of such suit, or to make its compromise or settlement dependent upon the written consent of strangers. Such powers are in the nature of public trusts conferred upon the corporation for the public benefit, and cannot be vicariously exercised. A contract attempting to delegate such powers is *ultra vires.* *Scollay* v. *County of Butte* *Cal.*, 188.

4. MANDATE AGAINST COUNTY TREASURER—PETITION—ALLEGATIONS OF, WHEN SUFFICIENT.—A petition for a writ of mandate to compel a county treasurer to pay a warrant issued to the plaintiff by the county auditor, need not allege that the claim

of plaintiff "was ordered paid" by the board of supervisors, if it be alleged that such board "audited and allowed said claim," and "ordered the auditor to draw his warrant in favor of the plaintiff on the defendant as treasurer," for the amount thereof. If such allegations are not denied, their truth is admitted. *Jones* v *Morgan, Treasurer, etc. Cal.*, 271.

5. FINDINGS HELD SUSTAINED.—The findings that the warrant in question was the property of the petitioner; that it was duly presented to and refused payment by the defendant, and by reason of such refusal no damage had resulted to the plaintiff, *held* sustained. *Id.*

6. SUPERVISORS—RETAINING DISTRICT ATTORNEY—CONTRACT WHEN VALID.—A board of supervisors has power to retain the district attorney of their county to attend to a case in which the county is interested, but which is to be tried in another county after his term of office should expire. Such contract is not, in effect, for an increase of the district attorney's salary, and is not void because made with the district attorney during his term of office. *Id.*

COUPONS.

See INTEREST, 2; STATUTE OF LIMITATIONS, 3, 5.

CRIMINAL LAW—IN GENERAL.

1. CRIMINAL LAW—TRIAL—POSTPONEMENT—DISCHARGE OF DEFENDANT.—Under section 465 of the criminal procedure act, a defendant, whose trial has not been had at the next term, of the court in which the indictment is triable after it is found, is not entitled, as of right, to be discharged from custody upon his own recognizance. The discharge of the defendant, under such circumstances, rests in the sound discretion of the trial court. *Ex Parte Lowrie. Utah*, 167.

2. CRIMINAL LAW—FILING INFORMATION—WHAT OFFENSE MAY BE CHARGED.—Under section 809 of the penal code, the district attorney is authorized to proceed against the defendant for the offense disclosed in the depositions taken on the preliminary examination before the committing magistrate, and is not confined to the offense designated by name, or even generally, by such magistrate in his indorsement made on the depositions. Thus, if such depositions disclose a case of muder, an information charging the defendant with such offense may be filed against him, although, by indorsement on the depositions, the committing magistrate order him to be held for manslaughter. *People* v. *Vierra. Cal.*, 169.

3. REASONABLE DOUBT, WHAT IS.—A reasonable doubt for a trial juror is such a doubt as a man of ordinary prudence, sensibility and decision, in determining an issue of like concern to himself, as that before the jury, would allow to have any influence whatever upon him, or make him pause or hesitate in arriving at his determination. The instructions as to what constitutes reasonable doubt reviewed, and held erroneous. *Leonard* v. *Territory. Wash.*, 470.

4. OBSERVATIONS MADE BY THE ATTORNEY FOR THE PEOPLE IN HIS ARGUMENT to the jury, as to facts not in evidence, will not warrant a reversal of a verdict of conviction, if the court, at the time, reproved the attorney for his conduct, and afterwards instructed the jury to disregard all facts not in evidence. *U. S.* v. *Musser. Utah*, 116.

See ALASKA; APPEAL, 13, 28; ATTORNEYS, 1; BURGLARY; CONSPIRACY; FALSE TELEGRAM, 1; LARCENY; MURDER; UNLAWFUL COHABITATION.

DAMAGES.

1. BREACH OF CONTRACT TO FURNISH MATERIALS—MEASURE OF DAMAGES.—Plaintiff contracted to deliver to the defendant, certain piles to be used in fulfillment of a contract between the latter and the drainage commissioners. Plaintiff had knowledge of the use for which the piles were intended. In an action to recover for the value of such piles, *held*, that the defendant was not entitled to show, that by reason of the delay of plaintiff in furnishing the piles, he was prevented from completing his contract for so long a time, that he did not realize the money therefor, which, but for such delay, he would have received from the state, through the drainage commissioners. *Friend & T. L. Co.* v. *Miller. Cal.*, 508.

2. THE SAME—PROXIMATE AND REMOTE CAUSE.—The failure of plaintiff to deliver the piles in time, was a *remote* not a *proximate* cause of defendant's failure to receive compensation on his contract. Such loss was not one "which, in the ordinary course of things, would be likely to result" from a failure to deliver under the contract. *Id.*

See APPEAL, 3; EXECUTORS AND ADMINISTRATORS, 1, 2; NEGLIGENCE, 14; INJUNCTIONS, 5; LIBEL, 1; TRESPASS, 2, 3; WATER AND WATER RIGHTS, 10.

DEED.

1. NAME OF GRANTEE INSERTED WITHOUT AUTHORITY—LEGAL TITLE.—A deed duly signed and acknowledged by the grantor, does not convey the legal title, if, after delivery, the name of the grantee is inserted without any authority from the grantor. This result follows notwithstanding the abolition of all distinctions between sealed and unsealed instruments. *Arguello* v. *Bours et al.* *Cal.*, 498.

2. THE SAME—POSSESSION OF GRANTEE UNDER CONTRACT OF PURCHASE.—Nor will the legal title pass to the grantee whose name is thus inserted, by reason of the fact that he had entered into possession of the land, under a contract of purchase with the grantor, and had fully performed the conditions thereof on his part. *Id.*

3. CONSIDERATION NEED NOT BE EXPRESSED—LEGAL TITLE.—A deed is valid and operative although no consideration is expressed therein, and conveys the legal title to the grantee, whether it was made to hinder and delay creditors of the grantor, or not. *Goad* v. *Moulton et als.* *Cal.*, 589.

4. DEFECTIVE ACKNOWLEDGMENT OF DEED CURED BY LEGISLATION.—The defect, if any, in the acknowledgment of a certain deed, *held* to have been cured by the act of the legislature, of November 10, 1873. *Kenyon* v. *Knipe et al.* *Wash.*, 485.

5. DESCRIPTION—UNCERTAINTY—COLOR OF TITLE—STATUTE OF LIMITATIONS.—A deed which describes the land intended to be conveyed as "three fractions of lot 7, J and K, Fourth and Fifth streets, Sacramento city," is void for uncertainty, but is sufficient to give color of title, so that possession under it will create a perfect title by operation of the statute of limitations. *Tryon* v. *Huntoon.* *Cal.*, 290.

See ADVERSE POSSESSION, 5; EJECTMENT, 1; MISTAKE, 1; TAXATION, 7, 11; TIDE LANDS, 2; WILLS, 1.

DEMAND.

See CHECK, 1; ESTATES OF DECEASED PERSONS, 1.

DEMURRER.

1. OVERRULING DEMURRER—SPECIFICATION OF ERROR.—Error specified to have occurred in overruling a demurrer to the complaint, will not be considered on appeal, if no demurrer appears in the transcript. *Damsguard* v. *Gunnoldson.* *Cal.*, 336.

2. MUST GO TO WHOLE CAUSE OF ACTION.—A demurrer cannot be interposed to a part of a cause of action or defense. If irrelevant, or immaterial, a motion to strike out may be interposed; but a demurrer, to avail anything, must go to the whole cause of action or defense. *Reed* v. *Drais.* *Cal.*, 523.

3. CAUSE OF ACTION—COMPLAINT.—A general demurrer, addressed to the whole complaint, in a portion of which a cause of action is stated, should be overruled. *Fleming* v. *Albeck.* *Cal.*, 177.

DESCRIPTION.

See DEED 5; MORTGAGE, 8.

DISBARMENT.

See ATTORNEYS.

DISCOVERY.

See EXCEPTIONS, 7.

DISCRETION.

See AMENDMENTS, 1, 2; CRIMINAL LAW, 1; JUDGMENT, 4.

DIVORCE.

1. CASE IN EQUITY—ALIMONY—APPEAL—REHEARING.—On a petition for rehearing, the rulings that an action for divorce is a case in equity, and that an appeal lies to the supreme court from the judgment of the superior court granting a divorce; and that an order made *pendente lite* by the superior court, directing the payment of alimony, is also appealable, affirmed, and a rehearing, as to such points, denied. A rehearing, however, granted on the question as to the character of the bond necessary to stay proceedings upon the order for payment of alimony. *Sharon* v. *Sharon*. *Cal.*, 178.

EJECTMENT.

1. CONSTRUCTION OF DEEDS—PLAINTIFF MUST RECOVER ON STRENGTH OF HIS OWN TITLE.—In an action of ejectment, the plaintiff must recover upon the strength of his own title; and where both parties claim under a common grantor, a prior deed to the plaintiff cannot be enlarged by a subsequent deed to the defendant. *Cox* v. *Hayes*. *Cal.*, 371.

2. OUSTER—POSSESSION OF DEFENDANT.—To sustain an action of ejectment the defendant's possession may be sufficient to constitute an ouster, although the land in controversy had not been so inclosed as to deprive the plaintiff of the possession of the same. *Sheldon* v. *Mull*. *Cal.*, 276.

3. TENANCY AT WILL AS DEFENSE—CONFLICT OF EVIDENCE—NONSUIT.—In an action of ejectment, tried before a jury, where the evidence is conflicting as to whether the defendant was or was not a tenant at will of the plaintiff, the court cannot grant a nonsuit on the ground that the evidence established such fact. *Simpson* v. *Applegate*. *Cal.*, 517.

4. CROSS-COMPLAINT—SPECIFIC PERFORMANCE—VERDICT ADVISORY IN EQUITY CASE.—In an action of ejectment, a cross-complaint, setting up a parol contract for a lease, and praying for the specific performance thereof, constitutes a case in equity; and the verdict of the jury, on the issues so raised, is merely advisory and may be disregarded by the court. *Haggin* v. *Raymond et al*. *Cal.*, 275.

5. EQUITABLE DEFENSE IN EJECTMENT—VENDEE IN POSSESSION UNDER CONTRACT.—Under the code practice a defendant may plead, as a defense to an action of ejectment, that he is in possession under a contract of purchase, the conditions whereof have been fully performed on his part; in other words, that he is in possession, under a contract, which gives him the right of possession, and that he is entitled to retain the same as against the bare, naked title of his vendor, which the latter holds disconnected from any real interest. *Aryuella* v. *Bours*. *Cal.*, 498.

6. THE SAME—FACTS CONSTITUTING EQUITABLE DEFENSE MUST BE PLEADED.—But, whether the defendant relies upon his equities merely as a defense to the ejectment, or alleges them in a cross bill and bases on them a prayer for equitable relief, the facts on which he relies must be set forth in the answer, as fully as it would be necessary to allege them in the stating part of a bill in equity, praying a decree for a conveyance of the legal title. In alleging such defense it is always safer to aver that the price paid was a just and fair price and the full value of the premises. *Id.*

7. THE SAME—Under such circumstances the defendant will usually pray for equitable relief. But if, by lapse of time or for any other reason, he may have lost his right to an equitable decree, he will still be entitled to rely on his perfect equity as a defense to an action brought to deprive him of the possession. *Id.*

See COUNTER CLAIM, 2; INTERVENTION, 1, 2.

ELECTION.

1. FORM OF BALLOT—SIZE MUST CORRESPOND TO STATUTORY REQUIREMENTS.—A ballot which does not conform to the requirements of section 1,191 of the political code, as to length, and in other minor respects, cannot be counted. *Reynolds* v. *Snow*. *Cal.*, 521.

2. FINDINGS—CONFLICT OF EVIDENCE—DOCUMENTARY EVIDENCE — REVIEW OF ON APPEAL.—The reason why a court of appeals declines, ordinarily, to interfere upon a conflict of evidence, is because the trial court has an advantage over the former, in that it can both hear the witness and observe his deportment, when before it, and delivering his testimony. When, however, the findings of the trial court are entirely based upon documentary evidence, such as ballots cast at an election, photographic copies of which are before the appellate court, the reason of the rule fails, and with it the rule itself. *Id.*

3. THE FINDING THAT CERTAIN BALLOTS WERE NOT INTENDED TO BE CAST for the appellant, reviewed, and *held*, from an inspection of photographic copies thereof, not sustained by the evidence. *Id.*

4. ELECTION CONTEST—MISTAKEN DESCRIPTION IN BALLOTS.—A candidate for the office of supervisor for the *first* district of a county, is entitled to have counted for him ballots which, on their face, showed that he was voted for as supervisor for the *second* district, when it appears, from all the circumstances of the case, that such ballots were intended for him. *Inglis* v. *Shepherd*. *Cal.*, 512.

5. ELECTION CONTEST—BALLOTS AS EVIDENCE.—In an election contest, the ballots are the primary and best evidence of the number of votes received by any candidate, provided they have not, in any way, been tampered with, and the burden is upon the contestant to show that fact. Such ballots are not inadmissible, from the fact that, for a certain time, they were in the possession of the contestant as the *de facto* county clerk. *Coglan* v. *Beard*. *Cal.*, 268.

6. THE SAME—STATEMENT OF FIRST COUNT AS EVIDENCE ON SECOND TRIAL.—On a second trial of an election contest, a tabulated statement showing the result of the count, by the judge, on the first trial of the case, is admissible in evidence, as tending to show whether the ballots had been tampered with between the dates of the trials. *Id.*

7. PUBLIC OFFICERS—BRIBERY OF ELECTORS—DISQUALIFICATION OF OFFICER.—Conceding that the statute of 5 and 6 Edward vi., ch. 16, disqualifying a person from holding an office who has resorted to corrupt means to obtain it, was adopted by the territorial legislature of 1861, and that it was continued in force by section 1 of the schedule to the state constitution, such statute was subsequently repealed by the act of March 8, 1877, entitled "An act regulating elections and repealing all territorial acts upon the subject." *People, ex rel. Thomas*, v. *Goddard*. *Col.*, 24.

8. THE SAME—CONSTITUTIONAL LAW—SUBJECT EXPRESSED IN TITLE OF ACT.—The provisions of said act of March 8, 1877, specifying the qualifications of those to be elected, and of the electors, are germane to the subject expressed in the title of the act, and, consequently, not repugnant to that clause in the constitution prohibiting the passage of bills containing more than one subject, and making void so much of any act as shall not be expressed in its title. *Id.*

9. ELECTION FOR SCHOOL TRUSTEES—JUDGE OF, CANNOT ADMINISTER OFFICIAL OATH.—A judge of an election for school trustees has no power to administer the official oath of office to the elected school trustees. The only oath which he can administer is the one prescribed in the statute of 1885, section 9, to a voter when challenged. *State, ex rel. Attorney General*, v. *Horton et al.* *Nev.*, 707.

10. THE SAME—OFFICIAL OATH MAY BE ATTACHED TO CERTIFICATE OF APPOINTMENT.—A statute requiring the official oath of a public officer to be endorsed on his certificate of appointment is sufficiently complied with if such oath be attached to the certificate. *Id.*

See CORPORATIONS, 4, 6.

EMINENT DOMAIN.

1. ROUTE FOR RAILROAD—RIGHT OF WAY.—A railroad corporation has the power, in eminent domain proceedings, to acquire a right of way for its road, in accordance with the most advantageous route. And the mere fact that it had, after its preliminary survey, acquired a right of way over another portion of defendant's land, over which it might, though at less advantage, build its road, does not render the taking unnecessary. *Eel River and Eureka R. R. Co.* v. *Field*. *Cal.*, 410.

EQUITY.

See DIVORCE; EJECTMENT, 4, 7; EXCEPTIONS, 1, 5.

ESTATE OF DECEASED PERSONS.

1. ACTION FOR DISTRIBUTIVE SHARE—DEFENDANT—DEMAND.—An action to recover the amount or sum distributed to plaintiff by a decree of distribution in the estate of a deceased intestate, and which was, by the terms of the decree, ordered to be paid by the administrator within a certain number of days, should be brought against the defendant individually, and not as administrator. In such action, the complaint need not allege a demand on the defendant as administrator, and refusal to pay. The suit itself is a sufficient demand. *Melone* v. *Davis*. *Cal.*, 255.

2. FAMILY ALLOWANCE—ORDER REFUSING—WHEN NOT DISTURBED.—An order refusing a widow and minor children a family allowance out of the estate of the deceased, will not be disturbed, when the petition therefor fails to state that the proceeds of the homestead set apart to them were insufficient for their support. *Estate of Luther, deceased*. *Cal.*, 282.

3. FURTHER FAMILY ALLOWANCE.—Under section 1,466, of the code of civil procedure, the widow of a deceased person, is entitled to a further family allowance out of the estate, when it appears that the allowance previously made is insufficient for her necessary wants, and the estate is solvent. *Estate of Roberts*. *Cal.*, 332.

4. A PARTIAL DISTRIBUTION ORDERED IN THE PRESENT ESTATE, upon the petition of certain distributees, the others consenting. *Estate of Roberts*. *Cal.*, 333.

See ALIEN; EXECUTORS AND ADMINISTRATORS; WILLS.

ESTOPPEL.

1. ACCOUNTING—ESTOPPEL—ACQUIESCENCE.—In an action for an accounting, *held* that, under the circumstances of this case, the respondent should not be estopped to dispute the correctness of certain items in which he had previously acquiesced, for the reason that at the time of acquiescence he could not have known the facts in connection therewith. *Kinney* v. *Heatley et al.* *Or.*, 62.

2. THE DEED OF TRUST IN CONTROVERSY held not to be a mortgage. *Id.*

3. DECREE ORDERED MODIFIED in accordance with the views expressed in the opinion. *Id.*

See BOUNDARIES, 2; EXECUTORS AND ADMINISTRATORS, 4; INSURANCE, 6; JUDGMENT ROLL, 3; MONTGOMERY AVENUE BONDS, 7; QUO WARRANTO, 4.

EVIDENCE.

1. PAROL EVIDENCE OF THE CONTENTS OF A LETTER IS INADMISSIBLE, unless a sufficient foundation has been laid therefor. *Leonard* v. *Territory*. *Wash.*, 470.

2. THE ADMISSION IN EVIDENCE OF A MAP, intended to exhibit and illustrate the vicinity of a supposed homicide, in a prosecution therefor, is within the discretion of the court. *Id.*

3. EVIDENCE TO IDENTIFY THIRD PERSON WITH KILLING.—Where the evidence tending to connect the defendant with the killing is entirely circumstantial, he is entitled to offer evidence of the same nature tending to identify some other person as the guilty party. *Id.*

4. REJECTION OF—MATERIALITY MUST BE SHOWN.—In the absence of a showing as to the materiality of testimony sought to be introduced in reference to the value of the property in dispute in an action to quiet title, the rejection of such testimony is not error. *Reed* v. *Davis*. *Cal.*, 523.

5. EVIDENCE OF VALUE—EXPERT TESTIMONY—FOUNDATION FOR.—A witness called upon to give an opinion on the subject of value, whether offered as an expert, or not, must lay a proper foundation for the introduction of his opinion, by showing he possesses the means to form an intelligent opinion, derived from an adequate knowledge of the nature and kind of property in controversy, and of its value. *Id.*

6. RES GESTÆ—DECLARATION AFTER INJURY NOT ADMISSIBLE.—Under sections 672 and 676 of the civil code statements and declaration of a party who has received

an injury, made after its occurrence, as to how it was occasioned, are not admissible as part of the *res gestæ* in an action to recover for such injury. *Sullivan* v. *Oregon Railway and Navigation Co.* *Or.*, 106.

7. ASSESSMENT ROLL WHEN NOT ADMISSIBLE TO SHOW TITLE OUT OF PLAINTIFF.—An assessment roll, in which the property demanded is assessed to plaintiff's husband, is not admissible in evidence to show title out of the plaintiff, unless proof is made, or offered, that the plaintiff gave in the property as that of her husband, or that she had knowledge that it was so assessed. *Shumway* v. *Leakey.* *Cal.*, 515.

8. THE LAWS OF A FOREIGN STATE ARE TO BE PROVEN, like any other facts. *Id.*

9. MARKET VALUE, HOW DETERMINED.—Upon a review of the evidence, *held*, that the market value of the wheat in controversy, was sufficiently shown by the evidence, and was in conformity to section 3,354 of the civil code. *Bullard* v. *Stone.* *Cal.*, 532.

10. IMPEACHING WITNESS—EVIDENCE OF HOSTILITY.—When a witness has testified to matters material to the issues, the party against whom he has testified, may, on cross-examination, show that the witness is hostile to or prejudiced against him; and to that end may lay the foundation for showing that the witness has attempted to buy or bribe other witnesses. But this can only be done when the witness has testified to material matters. *Luhrs* v. *Kelly.* *Cal.*, 252.

11. EVIDENCE TO CONTRADICT WITNESS.—Affidavits and letters of a witness, which tend, in a slight degree, to contradict his testimony, are to that extent, and for that purpose, admissible in evidence. *Empire G. M. Co.* v. *Bonanza G. M. Co.* *Cal.*, 395.

12. ACTION TO ENFORCE MARRIAGE CONTRACT—UNDUE INFLUENCE—SPIRIT MEDIUM.—In an action to enforce an alleged marriage contract, where the issue raised by the pleadings was whether or not the defendant's intestate, had, in his lifetime, been in such a state of mind as to have been unduly influenced to make the contract, by the plaintiff, who claimed to be and was believed by such intestate to be a medium of communication between spirits of dead people add living persons; *Held*, that evidence as to whether, in the opinion of the witness, the defendant's intestate was liable to be unduly influenced by such spirit mediums was inadmissible. *Connor* v. *Stanley, Adminstrator.* *Cal.*, 280.

13. CANCELLATION OF DEED—STATEMENTS OF DECEDENT AS TO CONSIDERATION OF DEED—EVIDENCE.—In an action to cancel a deed, made by a son, just preceding his death, to his father, and to quiet the title of the son's estate, to the lands purporting to be by that deed conveyed, in which an issue arises, whether or not the son acquired the land by a previous conveyance from his father, without consideration, and as a trustee for the latter, to reconvey them when requested by him so to do, evidence of statements made by the son, as to the nature of the transaction and to the consideration therefor, is admissible. *Harris, Administrator,* v. *Harris.* *Cal.*, 513.

14. OPINION OF JUDGE NOT ADMISSIBLE IN EVIDENCE.—The opinion of the judge who tried the case is no part of the judgment roll, and is not admissible in evidence. *Wixon* v. *Devine.* *Cal.*, 341.

15. WITNESS FALSE IN PART OF HIS TESTIMONY—PRESUMPTION.—Section 2,061 of the code of civil procedure, subdivision 3, provides that a "witness false in one part of his testimony *is to be* distrusted in others." Consequently, it is error for the court to instruct the jury that such witness *may* be distrusted. The distrust which is cast upon such witness is a presumption of law for the court, with which the jury has nothing to do, except to receive and act upon. It is a rebuttable presumption, to be overcome by facts and circumstances of which they are the sole judges. *White* v. *Disher.* *Cal.*, 387.

16. INCOMPETENT EVIDENCE MUST BE OBJECTED TO.—A party cannot assign the admission of incompetent evidence as error, unless he objected thereto at the trial. *Bullard* v. *Stone.* *Cal.*, 532.

17. THE ADMISSION OF IMMATERIAL evidence, calculated to mislead the jury, is error warranting a reversal. *Goad* v. *Moulton.* *Cal.*, 589.

18. THE ADMISSION OF INCOMPETENT EVIDENCE, if without prejudice to the appellant, will not warrant a reversal. *Damsguard* v. *Gunnoldson.* *Cal.*, 336.

19. THE RECORD REVIEWED AND HELD TO SHOW no material error. *Id.*

20. THE ERRONEOUS ADMISSION OF EVIDENCE IS NOT GROUND FOR REVERSAL, if the court instructs the jury to disregard it. *Puget Sound T. Co.* v. *Worthington. Wash.*, 480.

21. SPECIFICATIONS OF ERROR, HOW MADE—EVIDENCE.—Specifications of errors, in regard to the admission or rejection of evidence, should refer to the testimony as it appears in the transcript, in such a manner that the court may identify the exception reserved. Otherwise they will be disregarded. *Fleming* v. *Albeck. Cal.*, 177.

22. WHERE THE EVIDENCE IS CONFLICTING THE JUDGMENT of the court below will not be disturbed. *Haley* v. *Shepherd. Cal.*, 213.

23. WHEN THE EVIDENCE IS CONFLICTING, the findings will not be disturbed. *Cook* v. *Lion F. Ins. Co. Cal.*, 366.

24. WHEN THE EVIDENCE IS CONFLICTING, the findings will not be disturbed. *Moore* v. *Moore. Cal.*, 220.

25. REJECTION OF IMMATERIAL EVIDENCE IS NOT ERROR. *Id.*

26. WHERE THERE IS A SUBSTANTIAL CONFLICT IN THE EVIDENCE upon every point essential to a recovery the verdict will not be disturbed because not sustained by the evidence. *Clanton* v. *Coward. Cal.*, 363.

27. EVIDENCE AND PLEADINGS REVIEWED at length, and decree ordered to be entered in conformity with the opinion. *City of Salem Company* v. *Salem Flouring Mills Company. Or.*, 142.

See ADVERSE POSSESSION, 3; APPEAL, 12, 18; CLAIM AND DELIVERY, 12; CORPORATION, 8, 9; ELECTION, 2, 5; FINDINGS, 1, 2, 7; FORCIBLE DETAINER, 1; LIBEL, 1; MURDER AND MANSLAUGHTER, 1, 7, 9, 13–16; NEGLIGENCE, 2, 8, 9; NEW TRIAL, 1, 2, 4, 15; REFORMATION, 1; SPECIFIC PERFORMANCE, 1; TRESPASS, 1; UNLAWFUL COHABITATION, 4, 7; USURY, 1; VERDICT, 2, 8, 9, 10; WATER AND WATER RIGHTS, 1, 4, 5; WILLS, 4, 5.

EXCEPTIONS.

1. EXCEPTIONS TO ANSWER IN EQUITY FOR INSUFFICIENCY.—Exceptions for insufficiency to answer to particular allegations in bills in equity, only, lie, where a discovery is sought,—where the complainant seeks evidence to sustain his bill. *United States* v. *Kate McLaughlin et al.* (*U. S. Cir. Ct.*) *Cal.*, 431.

2. SAME—CORPORATIONS—INFANTS, ETC.—Such exceptions do not lie to answers of corporations; to answers wherein the defendant's oath is waived; to answers of the attorney general, or to answers of infants; because such answers are not evidence. *Id.*

3. THE FOUNDATION FOR AN EXCEPTION FOR INSUFFICIENCY consists of a sufficient allegation in the bill, and a sufficient interrogatory based upon it. *Id.*

4. SAME.—Under the old equity practice, the general interrogatory, at the end of the bill, requiring defendant to answer every allegation as fully and particularly, as if specifically interrogated thereto, was held to afford a foundation for an exception for insufficiency. But it was necessary, that there should be either a special interrogatory, or this general requirement. *Id.*

5. UNDER EQUITY RULES 41–43, it is, at least, doubtful, whether an exception for insufficiency, would now lie in the national courts without a special interrogatory. *Id.*

6. PRACTICE OF EXCEPTING FOR INSUFFICIENCY OBSOLETE, AND DANGEROUS TO COMPLAINANT.—Where the parties are competent witnesses, the practice of calling for a discovery, and, excepting to answers for insufficiency, is useless, and becoming obsolete. The great inconvenience, and danger, to complainant, of pressing the defendant to positive denials by exceptions pointed out. *Id.*

7. BILLS OF DISCOVERY OBSOLETE.—Whether a pure bill of discovery will lie, where the parties are competent witnesses, *quære?* *Id.*

8. EXCEPTIONS FOR IMPERTINENCE.—The court will not order matter excepted to as impertinent, to be striken out, unless its impertinence is very fully, and, clearly, made to appear. Nor will the court strike out matter as impertinent, because there are here, and there, a few unnecessary words. *Id.*

See APPEAL, 23.

EXECUTION.

1. EXEMPTION OF PROPERTY FROM EXECUTION IS A PERSONAL PRIVILEGE which a debtor may claim or waive at his pleasure. *Keybers* v. *McComber*. *Cal.*, 390.

2. EXEMPTION, HOW AND WHEN MUST BE CLAIMED.—Where the debtor has more property of a particular kind liable to seizure than is exempt from execution, and a writ is levied upon a portion only thereof, leaving as much as is by law exempt, and thereafter the debtor for the first time claims as exempt the property levied upon or a portion thereof, and leaving in the hands of the officer a less quantity than is necessary to satisfy his writ, then, and in that case, the debtor, to make good his claim of exemption, must offer to surrender to the officer the other property in his hands of the same general kind, subject to execution, or so much thereof as may be necessary to satisfy the writ, and, failing to do so, he is not entitled to recover against the officer. *Id.*

3. EXEMPTION—LIVERY STABLE KEEPER.—The Nevada statutes provide that the following property shall be exempt from execution: "Two oxen, two horses or two mules, and their harness, and one cart or wagon, by the use of which a cartman, huckster, peddler, teamster, or other laborer, habitually earns his living." *Held*, that such exemption did not apply to a team used by a livery stable keeper, in the ordinary course of his business, although he was accustomed to drive such team himself. *Edgecomb* v. *His Creditors* *Nev.*, 97.

See APPEAL, 3, 4; INDEMNITY, 1; INJUNCTIONS, 2; MARRIED WOMEN, 5.

EXECUTORS AND ADMINISTRATORS.

1. FRAUDULENT SALE OF LAND BY ADMINISTRATOR—ACTION AGAINST ADMINISTRATOR FOR—DOUBLE DAMAGES.—Under section 1,572 of the code of civil procedure, an executor or administrator, as the case may be, who fraudulently sells any real estate of a decedent, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein. Such damages are not recoverable, under the section, from the sureties on the official bond of the executor or administrator. *Weihe et al.* v. *Statham et al.* *Cal.*, 191.

2. THE SAME—ACTION ON BOND OF ADMINISTRATOR—DAMAGE.—No action can be maintained, under section 1,571 of the code of civil procedure, on the bond of an executor or administrator, to recover for his neglect or misconduct in relation to any sale of the real property of the deceased, unless it appears that the persons interested in the estate have suffered damage thereby. If it be alleged in such action that the land was sold for its full value, the presumption is that no damage was suffered, and the parties interested will be left to their remedy in the probate court. *Id.*

3. ADMINISTRATOR INTERESTED IN CLAIM CANNOT ACT ON IT.—An administrator, who is personally interested in a claim against the estate of his intestate, is disqualified, under section 1,510 of the code of civil procedure, from acting upon it. *Estate of Hill.* *Cal.*, 183.

4. MINOR HEIRS WHEN NOT ESTOPPED TO DISPUTE ACCOUNT.—Minor heirs of a deceased intestate are not estopped from questioning the correctness of the administrator's account, by reason of proceedings in the probate court for a sale of the real property to pay the alleged claim in dispute. *Id.*

5. FOREIGN EXECUTRIX CANNOT MAINTAIN ACTION IN THIS STATE.—Under section 1,913 of the code of civil procedure, a foreign executrix cannot maintain an action in the courts of this state, without first obtaining ancillary letters of administration or testamentary. *Lewis* v. *Adams*. *Col.*, 352.

See CERTIORARI, 2.

EXEMPTIONS.

See EXECUTION, 1, 3; MARRIED WOMEN, 5,6.

EXPERTS.

See EVIDENCE, 5.

FALSE TELEGRAM.

1. CRIMINAL LAW—SENDING FALSE TELEGRAM—INTENT TO DECEIVE.—Under section 474 of the penal code, a conviction for the crime of willfully sending a false message by telegraph, with intent to deceive, cannot be sustained, if it appear that the defendant had not the slightest idea of deceiving the person to whom the message was sent, and that such person was not deceived. *People* v. *Devon*. *Cal.*, 580.

See CRIMINAL LAW, 2.

FAMILY ALLOWANCE.

See ESTATE OF DECEASED PERSONS, 2, 3.

FENCES.

1. STATUTES IN FORCE CONCERNING.—The act of April 27, 1855, concerning lawful fences, and the act of April 3, 1860, amendatory and supplementary thereto, are applicable to the county of Stanislaus. These acts are retained in force by the provision of section 19, of the political code, and the counties to which they are applicable are not subject to the provisions of section 841, of the civil code. *Meade* v. *Watson*. *Cal.*, 740.

2. THE SAME—WHAT IS A LAWFUL FENCE.—A fence which forms a perfect inclosure, and is sufficient to turn stock, which is good, strong and substantial, and built of stone, is the equivalent of the lawful fences, specifically described in such statutes. *Id.*

3. THE SAME—ACTION TO RECOVER FOR PARTITION FENCE.—In an action by an adjoining proprietor to recover, and to foreclose a lien, for one-half the value of a partition fence, it is not necessary to show that all the fences surrounding and inclosing the lands of defendant are lawful fences, within the meaning of the statute. If they have been adopted by him, in completing his inclosure, and serve to inclose his land, and if plaintiff's fence complies with the law, it is sufficient. *Id.*

4. THE SAME—STATUTE NOT OBNOXIOUS TO CONSTITUTION—SPECIAL LEGISLATION.—The fence laws retained in force by the code, are not subject to the objection of being special legislation, and, therefore, obnoxious to the constitution of 1879. They were in force before the adoption of such constitution, and that instrument only applies to statutes passed after its adoption. *Id.*

5. THE SAME—DEMAND OF PAYMENT—AVERMENT OF.—In such action a complaint which shows the length of the division fence, and the value thereof at the time the inclosure was made, and that on a certain day the plaintiff demanded payment of one-half of said sum from defendant, which was refused, etc., sufficiently alleged a demand of payment. *Id.*

See BOUNDARIES.

FINDINGS.

1. EVIDENCE—WRONGFUL WITHHOLDING PROPERTY FROM ASSIGNEE.—The findings that the defendant had wrongfully and fraudulently withheld possession of a certain mill tract of land from the plaintiff, after due notice to yield its possession, and that of the saw-mill and logs and appurtenances; that by these wrongful and fraudulent acts the plaintiff had been kept out of possession of such property, and that the defendant had thus caused damage to the estate of the insolvent in the hands of the assignee, reviewed, and held supported by the evidence. *Damsguard, Assignee, etc.*, v. *Gunnoldson*. *Cal.*, 336.

2. SUFFICIENCY OF EVIDENCE—SPECIFICATIONS OF INSUFFICIENCY MUST BE PARTICULAR.—The sufficiency of the evidence to sustain the findings, will not be considered on appeal, if the bill of exceptions fails to specify the particulars in which the evidence is alleged to be insufficient. A specification that the "court erred in finding" certain facts, does not meet the requirements of section 648, of the code of civil procedure. *Coglan* v. *Beard*. *Cal.*, 268.

3. THE FINDINGS OF THE LOWER COURT WILL NOT BE REVIEWED on appeal, unless there was a motion for a new trial. *Cullum* v. *Paul*. *Ariz.*, 702.

4. ADMITTED FACTS.—Findings should be confined to the facts put in issue by the pleadings, and, upon such facts as are admitted, no findings are necessary. If, however, findings are made upon admitted facts, they should be in harmony, and not in conflict with them. *Walker* v. *Brem*. *Cal.*, 744.

5. AGREED STATEMENT OF FACTS.—In a case submitted upon an agreed statement of facts, no findings are necessary. *Hamil* v. *Littner*. *Cal.*, 251.

6. JUDGMENT AFFIRMED UPON THE AUTHORITY OF Hay v. Hill, 3 West Coast Rep., 352. *Id.*

7. EVIDENCE—FINDINGS.—In an action to recover for work and labor and money expended for the use of defendant, the evidence reviewed at length, and held that the findings of the lower were correct. *Martin* v. *Victor M. & M. Co.* *Nev.*, 608.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 3; COUNTIES, 5; EVIDENCE, 23, 24, 26; FORCIBLE DETAINER, 2; FRAUD, 2; MISTAKE, 1; STATUTE OF LIMITATIONS, 6.

FORCIBLE DETAINER.

1. ACTION BY LESSEE—LEASE AS EVIDENCE.—In an action, by a lessee, for a forcible detainer, his lease is admissible in evidence, in connection with his former possession, to show the extent of such possession, and that he was entitled thereto. *Murphy* v. *Snyder*. *Cal.*, 501.

2. THE SAME—CONCLUSIONS OF LAW IN FINDINGS.—In such action, a direction by the court, added at the conclusion of the findings of fact, that "judgment be entered in accordance with the foregoing findings in favor of plaintiff for restitution of said premises, and for his costs and disbursements in this action," is equivalent to a conclusion of law, that the plaintiff is entitled to recover the possession of the premises sued for. *Id.*

FORECLOSURE.

See MORTGAGE, 6, 12; STREET ASSESSMENT, 1.

FOREIGN LAWS.

See EVIDENCE, 9.

FRANCHISE.

See QUO WARRANTO, 1-4.

FRAUD.

1. FRAUD—SETTING ASIDE JUDGMENT—DEFAULT OF PLAINTIFF.—A judgment at law will not be set aside on the ground of fraud, unless the fraud was practiced in the very act of obtaining the judgment, without any default, either of the party against whom the judgment was rendered, or his counsel. *Zellerbach* v. *Allenberg et al.* *Cal.*, 491.

2. CONTEST BEFORE LAND DEPARTMENT—CONCLUSIVENESS OF FINDINGS—FRAUD.—The findings of the secretary of the interior, on questions of fact involved in a contest before the land department, cannot be collaterally attacked except for fraud or mistake. *Sparks et al.* v. *Brown et al.* *Wash.*, 484.

See CORPORATIONS, 3; EXECUTORS AND ADMINISTRATORS, 1; MINES AND MINING, 1; PLEADING, 4; SALE, 7.

GARNISHMENT.

1. TITLE CANNOT BE LITIGATED IN GARNISHEE PROCEEDINGS.—In garnishee proceedings, under section 182 of the code, the title to property in the hands of the garnishee, and claimed by him, cannot be litigated. *Coombs* v. *Davis et al.* *Wash.*, 465.

GRANTOR AND GRANTEE.

See DEED.

GROWING CROPS.

See ADVERSE POSSESSION, 2.

GUARANTY.

1. GUARANTY—FAILURE OF CONSIDERATION—CORPORATION.—A guaranty, founded on an alleged agreement executed by the officers of a corporation, which they had no authority to execute, is without consideration. *Granger* v. *Bourn*. *Cal.*, 354.

HABEAS CORPUS.

1. APPEALS—HABEAS CORPUS.—Under section 764 R. S., amended by the act of March 3, 1885, (session laws, 1885, 437) the right of appeal in *habeas corpus* cases is absolute, and not dependent upon the discretion of the judge, to allow or deny an appeal. *In re Sun Hung and Si Yee*. (*U. S. Cir. Ct.*) *Cal.*, 313.

2. CHINESE RESTRICTION ACT.—Policy of allowing appeals on questions of fact arising under the Chinese restriction act discussed, and limitations on the right of appeal suggested. *Id.*

3. PETITIONER REMANDED for want of error in the proceedings. *In re Patterson, on Habeas Corpus*. *Cal.*, 282.

See CHINESE RESTRICTION ACT, 1, 2; WITNESS, 1.

HIGHWAYS.

See NAVIGABLE STREAM, 1.

HOMESTEAD.

See ADVERSE POSSESSION, 5; MORTGAGE, 13.

HUSBAND AND WIFE.

See ADVERSE POSSESSION, 5; MARRIED WOMEN.

INDEMNITY.

1. PROMISE OF INDEMNITY—LIABILITY OF PROMISOR—STATUTE OF FRAUDS—EXECUTION.—The defendants were sureties on an undertaking on appeal from a justice's court. After such appeal had been dismissed, they requested the plaintiff, a constable, to levy execution upon certain personal property, which they stated belonged to the judgment debtor. The plaintiff asked from the defendants a bond of indemnity to secure him against any damages he might sustain by reason of the levy and sale, should they prove to be wrongful. The defendants verbally promised to indemnify him, whereupon the plaintiff levied upon and sold the property under the execution, and thereby paid and satisfied the judgment in full. Such property did not belong to the judgment debtor, and the plaintiff, in an action against him by the owner, was compelled to pay for the conversion thereof. The plaintiff thereupon sued the defendants upon their verbal promise of indemnity. *Held*, that such action could be maintained; that if the execution was issued at the request of the defendants, without the knowledge of the judgment creditor, he ratified and confirmed their act in ordering it, when he accepted the money under it in full payment and satisfaction of his judgment; that the interest the defendants had in having the execution satisfied out of the property of the judgment debtor, was a sufficient consideration for their promise of indemnity, and that such promise was not within the statute of frauds. *Lerch* v. *Gallup et al.* *Cal.*, 745.

INDIAN COUNTRY.

See ALASKA.

INJUNCTION.

1. DIVERSION OF WATER, WHEN RESTRAINED—NATURAL CHANNEL.—An owner of land located on a water course is not entitled to have the diversion of water therefrom restrained, unless such diversion diminishes the quantity which would otherwise have flowed therein by a natural channel. *Creighton* v. *Kaweah Canal and Irrigation Co.* *Cal.*, 176.

2. INJUNCTION—RESTRAINING EXECUTION OF JUDGMENT.—An injunction will not lie to restrain the execution of a judgment when it appears from the complaint that the object of the injunction suit is to litigate the same subject matter that was determined in the action in which the judgment was obtained. *Wingard* v. *Jameson et al.* *Wash.*, 483.

3. INJUNCTION—FRAUDULENT MORTGAGE—RIGHTS OF ATTACHING CREDITOR.—Under section 1,997 of the code, the district court has jurisdiction to grant an injunction, enjoining the foreclosure of a fraudulent mortgage, at the instance of an attaching creditor of the mortgagor, who has not reduced his claim to judgment. *E. C. Meachim Arms Company* v. *Swartz et al.* *Wash.*, 467.

4. ORDER DISSOLVING INJUNCTION—TIME OF APPEAL.—An order dissolving an injunction cannot be reviewed on appeal, unless an appeal therefrom be taken within sixty days. *Barham et al.* v. *Hostetter.* *Cal.*, 223.

5. DAMAGES—INJUNCTION—JOINDER OF CAUSES OF ACTION.—A cause of action for damages which is not joint as to all the plaintiffs, but undoubtedly several, cannot be joined with a cause of action for an injunction which is common to all the plaintiffs. *Id.*

6. THE COMPLAINT IN THIS ACTION HELD AMBIGUOUS, UNINTELLIGIBLE, AND UNCERTAIN, for insufficient description of the property, alleged to be affected by the acts of the defendant. *Id.*

See NAVIGABLE STREAM, 1; TAXATION, 5, 11, 12; WATER AND WATER RIGHTS, 7.

INSOLVENCY.

1. INVOLUNTARY INSOLVENCY—JURISDICTION WHEN ACQUIRED—NOT SUBJECT TO COLLATERAL ATTACK.—Where a petition in involuntary insolvency proceedings is properly signed, verified and filed, and a copy thereof, together with a copy of the order to show cause, is regularly served on the debtor, in the manner provided by law for the service of summons in civil actions, the court obtains jurisdiction of the case, and for errors afterwards committed, such as the filing by the assignee of a bond, in an amount less than that ordered by the court, its proceedings cannot be collatterly attacked. *Luhrs, Assignee, etc.*, v. *Kelly.* *Cal.*, 252.

2. THE SAME—ASSIGNMENT EVIDENCE OF ASSIGNEE'S RIGHT TO SUE.—Under section 18 of the insolvency act of 1880, a certified copy of the assignment is conclusive evidence of the assignee's authority to sue. *Id.*

3. ADJUDICATION IN INVOLUNTARY INSOLVENCY—PROCEEDINGS ARE IN REM—SERVICE BY PUBLICATION SUFFICIENT.—An adjudication of a debtor to be an involuntary insolvent may properly be considered as *in rem*, as regards the status of such debtor. And publication of the notice required by section 10 of the act of 1880 is sufficient. *Arnold, Assignee, etc.*, v. *Kahn.* *Cal.*, 541.

4. THE SAME—ASSIGNEE MAY MAINTAIN ACTIONS.—After a debtor has been adjudged an involuntary insolvent, the right to recover and distribute his property and rights in action accrues to the assignee, and he may prosecute actions against, and have recovery from, parties, under said act, in the same manner as if personal service prior to the order adjudicating his status had been had on the debtor. *Id.*

5. PETITION FOR INVOLUNTARY INSOLVENCY HELD SUFFICIENT.—*Campbell et al.* v. *Judd et al.* *Cal.*, 372.

6. ORDER REFUSING TO REMOVE ASSIGNEE—APPEAL.—An order of the circuit court, refusing to remove an assignee in insolvency, is not appealable. *In re Goldsmith et al., Insolvent Debtors.* *Or.*, 730.

7. APPEALS IN SPECIAL PROCEEDINGS, WHEN LIE.—Where a court or judge is directed by statute to exercise a particular function, in a manner different entirely from the ordinary mode of procedure by action or suit, no appeal to the supreme court will lie, unless provided for in the act itself, for the reason that the general statutes of

Oregon, regulating appeals to the supreme court, do not extend to such a case, and no such right exists except by force of a statute. *Id.*

See APPEAL, 1.

INSTRUCTIONS.

1. INSTRUCTIONS—FAILURE OF JURY TO HEAR.—The fact that the jury did not hear the instructions of the court, because of noise in the court room, will not warrant a reversal. *People* v. *Price*. *Cal.*, 339.
2. A REFUSAL TO GIVE INSTRUCTIONS WHICH HAVE ALREADY BEEN GIVEN in substance is not error. *Bullard* v. *Stone*. *Cal.*, 532.
3. THE REFUSAL TO GIVE INSTRUCTIONS REQUESTED IS NOT ERROR, if the instructions giv en properly cover the entire case. *Cunningham* v. *U. P. Ry. Co.* *Utah*, 445.
4. THE REFUSAL TO GIVE INSTRUCTONS REQUESTED will not warrant a reversal, if the same have been given in substance, or if the instructions given cover the entire case. *U. S.* v. *Musser*. *Utah.*, 116.
5. THE EVIDENCE REVIEWED at length, and held to warrant a verdict of conviction. *Id.*
6. A REFUSAL TO GIVE INSTRUCTIONS WHICH HAVE ALREADY BEEN GIVEN in substance is not error. *Dufour* v. *C. P. R. R. Co.* *Cal.*, 345.
7. INSTRUCTION TO CONSIDER SURROUNDING CIRCUMSTANCES.—An instruction that the jury, in case they found for plaintiff, "must take into consideration all the circumstances surrounding the case." cannot be interpreted as authorizing them to consider facts not embraced in the pleadings or evidence. *Id.*
8. CERTAIN INSTRUCTIONS considered and held warranted by the pleadings and evidence. *Id.*
9. INSTRUCTIONS—CONTRADICTORY, MUST BE EXCEPTED TO.—If contradictory instructions are given, the court commits an error of law, but such error must be excepted to when the ruling is made, or it cannot be considered on appeal. *Sierra U. W. Co.* v. *Baker*. *Cal.*, 734
10. INSTRUCTIONS HELD TO BE WITHOUT ERROR. *Luhrs* v. *Kelly*. *Cal.*, 252.

See ADVERSE POSSESSION, 4; APPEAL, 25; MURDER AND MANSLAUGHTER, 5, 8-10, 12, 18, 19; TRESPASS, 2.

INSURANCE.

1. FIRE INSURANCE—BREACH OF CONDITION AVOIDS POLICY.—A breach of any one of the conditions contained in a policy of fire insurance, on the part of the assured, is a good defense to his right of recovery. *Wenzel* v. *Commercial Insurance Company of California*. *Cal.*, 420.
2. THE SAME—EMPLOYMENT OF WATCHMAN—BREACH OF CONDITION.—A policy of insurance, on a quartz mill, contained a condition that "a watchman shall be employed by the assured to guard the premises during such time as the mill is idle." The person claimed to have been employed as a watchman worked in his own mine, twenty-two hundred feet distant from the mill, for six or seven hours during the day; at night he slept in a house nine hundred feet from the mill, between which house and the mill a hill intervened, which prevented him from seeing the mill. The mill was burned at night, without the knowledge of the so-called watchman. *Held*, that the condition of the policy was not complied with. *Id.*
3. THE SAME—CHANGE OF POSSESSION—LEASE OF PROPERTY INSURED.—A condition in such policy, that any change in possession, without the written assent of the company, shall render the policy void, is broken, if the assured, without obtaining such assent, leases the property assured, and surrenders the possession to another. *Id.*
4. ACTION ON INSURANCE POLICY—BREACH OF CONDITIONS MUST BE SPECIALLY PLEADED.—In an action on an insurance policy, the defendant, if he relies upon a breach of some particular condition of the policy, must specially plead it. Evidence thereof is inadmissible under a general denial that the plaintiff had performed all the conditions on his part. *Pittenger* v. *Providence Washington Insurance Company*. (*U. S. Cir. Ct.*) *Col.*, 265.

5. FIRE INSURANCE—AMOUNT OF LOSS—STATEMENT IN PROOF OF LOSS.—In an action against a fire insurance company, to recover the amount of a loss, the assured is not limited to the amount claimed in the proof of loss, if he was induced to execute the same through the false representation of the company's adjuster. *Cook* v. *Lion F. Ins. Co. Cal.*, 366.

6. LIFE INSURANCE—CONDITION AGAINST INTEMPERANCE—WAIVER—ESTOPPEL—KNOWLEDGE OF AGENT.—The fact that an assured, at the time of his insurance, was intemperate to such a degree as to impair his health, avoids the policy if the same contain a condition that if the party insured should become so far intemperate as to impair his health, the policy should be void; and the knowledge of such fact, by the agent of the company, will not operate to estop it from relying upon the violation of such condition, as a defense to an action on the policy, or be regarded as a waiver thereof, if, at the time of the execution of the policy, the party in whose favor the same was issued also knew of such fact. *Pomeroy* v. *Rocky Mountain Insurance Co. Col.*, 28.

See MORTGAGE, 4, 5.

INTENT.

See MURDER AND MANSLAUGHTER, 10.

INTEREST.

1. INTEREST, HOW ALLEGED—NOT A SEPARATE CAUSE OF ACTION.—In an action for goods sold and delivered, interest on the principal debt due does not constitute a separate cause of action. And the simple statement, in concise language, that a given sum is due for interest, does not render the complaint ambiguous, unintelligible or uncertain, in any respect. *Friend and Terry Lumber Co.* v. *Miller. Cal.*, 508.

2. INTEREST ON COUPONS.—Under section 1,917, civil code of California, where there is no special provision as to interest upon bonds and coupons, both the bonds and the coupons bear interest, after maturity, at the ordinary legal rate, whether the coupons are detached from the bonds or not. *Nash* v. *El Dorado Co.*, (*U. S. Cir. Ct.*) *Cal.*, 1.

See MORTGAGE, 3; PAWNBROKERS, 1.

INTERVENTION.

1. INTERVENTION—NATURE OF—DOES NOT CHANGE CHARACTER OF ORIGINAL ACTION—EJECTMENT—JURY TRIAL.—An intervention, under section 662 of the former practice act, merely results in the addition of a new party or parties to the original action, for the purpose of hearing and determining, at the same time, all conflicting claims which may be made to the subject matter in litigation; it does not change the nature of the action itself, or stop the machinery of a trial thereof. Consequently, the plaintiff, in an action of ejectment, is entitled to a jury trial, notwithstanding an instruction, praying for equitable relief, is filed, and a denial thereof is error. *Reay* v. *Butler et al., and Treadwell, Intervenor. Cal.*, 195.

2. THE SAME—INTERVENTION WHEN NOT ALLOWED IN EJECTMENT.—Whether intervention is applicable at all to an action of ejectment, *quære*. But where a person does not claim to have derived title from plaintiff or defendant in the action, and does assert title in himself paramount to both plaintiff and defendant, there can be no intervention. *Id.*

3. THE SAME—JUDGMENT MUST NOT INCLUDE MORE THAN COMPLAINT.—In such action, where the intervenor asserts a right to only a part of the demanded premises, it is error for the court to adjudge him to be the absolute owner of the whole thereof, and to perpetually enjoin the plaintiff from prosecuting his action and from ever thereafter maintaining any other action for the same land. *Id.*

INVENTION.

See PATENTS, 1.

JUDGMENT.

1. FINAL JUDGMENT IN PURSUANCE TO STIPULATION.—Under the stipulation which is recited in the prior opinion of the court, reported in 1 West Coast Rep., 872, *held*, that the judgment in the present case was properly entered; that the judgment in the Lycoming case became final in the sense of the stipulation, when the time to move for a new trial and to appeal therefrom had elapsed, and no motion was made and no appeal taken; that after such judgment became final the plaintiff had a right, under the stipulation, to take judgment in the present case, without amending her complaint. *Gilmore* v. *American Central Insurance Company*. *Cal.*, 358.

2. JUDGMENT ON PLEADINGS WHEN NOT AUTHORIZED.—A judgment on the pleadings cannot be rendered, if the answer denies the material facts stated in the complaint, even if the answer sets up a special defense separately stated, which admits the allegations formerly denied, and such defenses are inconsistent. *Botto* v. *Vandament*. *Cal.*, 328.

3. THE SAME—INCONSISTENT DEFENSES.—In an action for damages for the diversion of water, and for an injunction, the defendant pleaded title in himself under the statute of limitations, and specially denied the allegations of the complaint. He also set up that his wife was the owner of the water, and the water privileges, in dispute, that he was in possession as her agent, and disclaimed any further interest in the subject matter of the suit. *Held*, that the answer raised issues of fact, and that a judgment for the plaintiff on the pleadings was erroneous. *Id.*

4. DEFAULT JUDGMENT—ABSENCE OF ATTORNEY—SETTING ASIDE DEFAULT—DISCRETION.—It is no abuse of discretion for a court to set aside a judgment for the defendant, rendered in the absence of the plaintiff and his attorneys, who resided at a distant place, and who had reason to believe that the case would not be tried at the time it was taken up. *Cameron, Executor, etc.*, v. *Carroll*. *Cal.*, 567.

5. A MERE CLERICAL ERROR IN THE AMOUNT OF THE JUDGMENT as entered, will not warrant a reversal. *Cullum* v. *Paul*. *Ariz.*, 702.

6. JUDGMENT—CLERICAL ERRORS—AMENDMENT.—Clerical errors in a judgment, where they are shown by the record, may be corrected at any time so as to make the judgment entry correspond with the judgment rendered. And this may be done even after an appeal and affirmance of the judgment. *Dreyfuss* v. *Tompkins*. *Cal.*, 329.

7. THE SAME.—In an action to recover possession of certain personal property, the jury found that the plaintiff was the owner of the property, and entitled to its return; or, if a return thereof cannot be had, then, for the sum of four hundred dollars, with interest thereon from June 16, 1882. As entered, the judgment read, after reciting the verdict, that plaintiff have and recover from the defendant "costs and disbursements incurred in this action, amounting to the sum of ninety-five and fifty one-hundredths dollars." On appeal, the judgment was affirmed. *Held*, that after the filing of the remittitur in the lower court, the judgment could be amended so as to conform to the verdict. *Id.*

8. REVERSAL OF JUDGMENT—REPAYMENT OF MONEY PAID UNDER.—When judgment is reversed on appeal, an order, under section 957 of the code of civil procedure, for the repayment of money, will not be granted, unless it appears that the money was paid after, and in consequence of, the judgment appealed from. *Reynolds* v. *Reynolds*. *Cal.*, 629.

9. JUDGMENT REVERSED WITH INSTRUCTIONS to insert in the findings all documents showing title in the respective parties. *Hulsey* v. *Bryan*; *Fitzpatrick* v. *Bryan*; *Wilson* v. *Bryan*. *Cal.*, 427.

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12. THE COMPLAINT HELD TO STATE FACTS SUFFICIENT to constitute a cause of action. *Id.*

See AMENDMENT, 3; APPEAL, 3, 6, 21; CLAIM AND DELIVERY, 3; CONTEMPT, 6; COSTS, 2; EVIDENCE, 22; FRAUD, 1, 2; INJUNCTION, 2, 3; INTERVENTIONS, 3; JURISDICTION, 4, 6; MORTGAGE, 7; STREET ASSESSMENT, 1.

JUDGMENT ROLL.

1. PRIOR RECOVERY—RECORD HOW FAR CONCLUSIVE.—A record is not conclusive as to the truth of any allegations which were not material and traversable, but as to things material and traversable it is conclusive and final. And as to questions thus essential and determined, the judgment is, as a plea, in bar, or, as evidence, conclusive between the same parties, upon the same matter, everywhere. *Wixson* v. *Devine*. *Cal.*, 341.

2. THE SAME.—Upon a comparison of the judgment roll in a former action between the parties, with the pleadings in the present case, *held*, that the same identical question, viz., the right of plaintiff to have and divert twenty-five inches of water from a certain ravine at his dam on said ravine, was a material question in issue and essential to the determination of each action; that such question was finally determined in the former cause, in favor of the plaintiff and should not again be litigated between the same parties. *Id.*

3. PRIOR RECOVERY IN FAVOR OF PLAINTIFF—WHEN NEED NOT BE PLEADED—ESTOPPEL.—Where a plaintiff has obtained judgment on certain issues raised by the defendant in his answer in a subsequent action, it is neither necessary or proper for him to plead such prior recovery. The prior judgment operates by way of estoppel to the defense set up by the defendant, and as, under the California system of pleadings, there is no replication to the answer, such estoppel cannot properly be pleaded. *Id.*

JUDICIAL NOTICE.

See SURVEYS, 1.

JURISDICTION.

1. JURISDICTION OF INFERIOR AND SUPERIOR COURTS—PRESUMPTIONS.—A justice court is an inferior court and its jurisdiction must be shown affirmatively, by a party relying upon or claiming any right under its judgments. No presumption will be indulged in favor of its jurisdiction. In superior courts, the presumption is in favor of the regularity of their proceedings and of their jurisdiction, and he who challenges either must show affirmatively the grounds of his objection. *Keybers* v. *McComber*. *Cal.*, 390.

2. THE SAME—WANT OF JURISDICTION—EFFECT OF.—It does not follow, however, that the rule of decision differs upon the same state of facts, when ascertained. It is only in the mode of ascertaining them that the distinction exists. In a *court of record* a given fact is presumed, but when shown by the record not to exist error is made to appear; in a *justice court*, the same fact must be proven or it will be presumed not to exist, and like error is manifest. *Id.*

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4. JURISDICTION—ERRONEOUS EXERCISE OF—JUDGMENT.—When a court has obtained jurisdiction over the persons and over the subject matter, error in the exercise of that jurisidiction does not make the judgment void. *Darke* v. *Ireland*. *Utah*, 325.

5. EXCESSIVE JUDGMENT NOT VOID.—A judgment is not void, if given for a greater amount than the party is entitled to, if the court has jurisdiction over the parties and the subject matter. *Id.*

6. ADJOURNMENT OF TERM—EFFECT OF ON JURISDICTION.—After an adjournment of a term at which a judgment is rendered, the court loses all power to set it aside on motion made at a subsequent term, in the absence of a statute authorizing it to be done. Jurisdiction for that purpose is not retained by reason of an ineffectual attempt to move for a new trial. *Id.*

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See ALASKA, 1; APPEAL, 13; CERTIORARI, 1; CONTEMPT, 1, 2; CORPORATIONS 5; INSOLVENCY, 1.

JURY.

1. JURY TRIAL—WAIVED BY PROCEEDING TO TRIAL BEFORE COURT.—A jury trial is waived, if, on the day the cause was set for trial, the parties appeared, and the trial proceeded before the court, without objection, and without a jury having been demanded. *Boston T. Co.* v. *McKenzie. Cal.*, 528.

See INSTRUCTIONS, 1; INTERVENTION, 1; VERDICT, 4, 11.

JUSTICE'S COURT.

1. APPEAL FROM JUSTICE'S COURT—SERVICE OF NOTICE OF—AFFIDAVIT OF.—Where the record of a case on appeal from a justice's court is silent as to service of the notice of appeal, the fact of service may be proved by affidavit; but the affidavit must show that all the requirements of the law to effect service were complied with. *Dalzell* v. *Superior Court of San Benito County. Cal.*, 502.

2. THE SAME—AFFIDAVIT OF SERVICE ON ATTORNEY ABSENT FROM OFFICE.—An affidavit of service which states that the notice of appeal was served on the attorney for the respondent "by leaving it on the desk of said attorney in the front room of his law office * * * between the hours of eight in the morning and six in the afternoon of the sixth day of June, 1885, * * * and that there was no person in said front room of said office at the time said notice of appeal was left there," is insufficient to show constructive service of the notice upon an attorney absent from his office, under section 1,011 of the code of civil procedure. *Id.*

3. THE SAME—SERVICE OF NOTICE JURISDICTIONAL—DISMISSAL OF APPEAL.—Service of such notice of appeal is a jurisdictional fact, and if service has not been made within statutory time, according to the requirements of the statute, the appellate court derives from the notice no actual jurisdiction of the case, and the appeal is dimissible *ex mero motu*, or on motion of respondent, for want of jurisdiction. *Id.*

4. APPEAL FROM JUSTICE'S COURT—TIME IN WHICH TO PERFECT.—Where a notice of appeal from a justice's court is served and filed, and the undertaking on appeal is filed, within the time prescribed by statute, the superior court obtains jurisdiction of the appeal, and cannot dismiss the appeal for want of jurisdiction. The mere order in which the acts, necessary to the perfection of the appeal, are done, is immaterial, when done within the time limited by the statute. *Hall* v. *Superior Court of El Dorado County. Cal.*, 506.

5. EQUITY JURISDICTION—JUSTICE'S COURT—APPEAL.—A bill in equity does not lie to restrain the enforcement of a judgment of the justice's court, alleged to have been obtained by reason of the intimidation of the plaintiff's witnesses. The remedy in such case is by appeal to the circuit court, and the fact that such remedy has been lost by reason of the negligence of the plaintiff in failing to serve a notice of appeal in the proper manner, will not create a jurisdiction equity. *Scoggin* v. *Hall. Or.*, 52.

6. JUSTICE'S COURT—JUDGMENT—DOCKETING IN CIRCUIT COURT—REVIVAL.—A judgment of the justice's court, properly docketed in the judgment docket of the circuit court, as provided in section 53, *et seq.*, of the justice's code, becomes a lien upon the real property of the defendant from the date of docketing, and stands upon the same footing as a judgment of the circuit court. Such judgment may be revived by the circuit court in the same manner as a judgment rendered therein. *Glaze* v. *Lewis. Or.*, 42.

7. JUSTICE COURT—ACTION INVOLVING TITLE TO REAL ESTATE—TRANSFER TO A DISTRICT COURT.—An action, originally brought in the justice's court, should be certified to the district court, if, during the trial of the cause before the justice, it appears that questions of title to real property are necessarily involved. The district court has jurisdiction thereof, although, after the transfer, the complaint is amended so as to change the cause of action. *James* v. *Leport. Nev.*, 543.

See JURISDICTION, 1-3.

LARCENY.

1. CRIMINAL LAW—POSSESSION OF RECENTLY STOLEN PROPERTY—PRESUMPTION.—The presumption raised by the possession by the prisoner of recently stolen property is one of fact from which the jury may infer guilt. And it is error for the court to

instruct them as a matter of law, to convict, upon such possession being unexplained. *State* v. *Hale*. *Or.*, 141.

2. GRAND LARCENY—DEGREES OF CRIME—VERDICT.—Under sections 486 and 487, of the penal code, there is but one degree of grand larceny. Consequently, under an information charging the defendant with grand larceny, in taking the sum of eleven dollars from the person of another, a verdict finding the defendant guilty, is sufficient in form. *People* v. *Price*. *Cal.*, 339.

See BURGLARY, 1; CRIMINAL LAW.

LEASE.

See ADVERSE POSSESSION, 5; FORCIBLE DETAINER, 1; INSURANCE, 3.

LIBEL.

1. LIBEL—DAMAGES A QUESTION FOR JURY—EVIDENCE.—In an action for libel, when no special damages are alleged, a witness cannot testify as to what, in his opinion, would be a fair amount of money, in compensation for plaintiff's damages. In such case the amount of damages is for the jury. *Fleming* v. *Albeck*. *Cal.*, 177.

LICENSE.

1. MONEY PAID FOR ILLEGAL LICENSE CANNOT BE RECOVERED.—No action lies to recover money voluntarily paid in satisfaction of an illegal license. Section 3,804 of the political code does not authorize such action. *O'Brien* v. *County of Colusa*. *Cal.*, 554.

MALICE.

See MURDER AND MANSLAUGHTER, 2.

MANDAMUS.

See APPEAL, 27; COUNTIES, 4.

MAP.

See EVIDENCE, 2.

MARRIED WOMEN.

1. MARRIED WOMAN—ACTION FOR SEPARATE PROPERTY—COVERTURE NEED NOT BE ALLEGED.—In an action by a married woman to recover her separate property, it is not necessary for her to aver coverture in her complaint; and, if such fact appears on trial, it is competent for her to show that the demanded property came to her as a gift, and was her separate property. *Shumway* v. *Leakey*. *Cal.*, 515.

2. THE SAME—COMPLAINT SHOWING COVERTURE—ESSENTIAL ALLEGATIONS.—If the complaint shows the plaintiff to be a married woman, it is necessary for her to state such other facts as are necessary to entitle her to maintain the action. *Id.*

3. THE SAME—SCHEDULE OF SEPARATE PROPERTY—EVIDENCE OF WIFE'S TITLE.—In such action, the schedule of plaintiff's property, filed and recorded in the office of the county recorder, is *prima facie* evidence of her title, under sections 165 and 166 of the civil code, and is admissible in evidence to show the same. *Id.*

4. PROPERTY ACQUIRED IN FOREIGN STATE—TENURE OF TITLE—PRESUMPTION AS TO FOREIGN LAWS.—The tenure by which property acquired in another state, and brought here, is held, as between husband and wife, will depend upon the laws of the state where acquired. But, in the absence of any proof as to the laws of such other state, they will be presumed to be the same as the laws of California. *Id.*

5. MARRIED WOMAN'S PROPERTY—EXEMPTION FROM LIABILITY FOR HUSBAND'S DEBTS.—The effect of the act of April 28, 1854, providing that "all real and personal estate to which any married woman shall hereafter become entitled to, in her own right, and all which may at the time of her marriage belong to her, * * *

shall not be liable to attachment for, or execution upon, any liability or judgment against her husband, so long as she, or any minor of her body, shall be living," is to create an exemption of the husband's estate in the wife's property, in favor of the wife. *Lemon et al.* v. *Waterman et al.* *Wash.*, 619.

6. THE SAME—WHEN INVENTORY OF SEPARATE PROPERTY NEED NOT BE FILED.—The provisions of the act of December 2, 1869, requiring a married woman to file an inventory of her separate property, in order to exempt it from seizure for her husband's debts, has no application to property acquired by the wife prior to the passage of such act. *Id.*

7. MARRIED WOMAN'S CONTRACT—AGREEMENT TO PAY DEBT OF ANOTHER—STATUTE OF FRAUDS.—The appellant, a married woman, as part consideration of a tract of land, promised to pay certain debts of her husband. *Held*, that, under section 154 of the civil code, she was capable of entering into such contract; that the same did not require to be in writing, under the statute of frauds, and that her husband's creditors, in whose favor such promise was made, could maintain an action thereon, although they were not parties to the agreement. *Sacramento Lumber Co.* v. *Wagner et al.* *Cal.*, 262.

8. MARRIED WOMAN MAY MAKE PROMISSORY NOTE—BONA FIDE PURCHASER.—A promissory note, made by a married woman, in the hands of an innocent purchaser for value before its maturity, is valid and binding upon her, although it may have been agreed between her and the payee that payment of such note never would be demanded or required. *Goad* v. *Moulton.* *Cal.*, 589.

9. ACCOMMODATION NOTE—MARRIED WOMAN LIABLE ON.—A promissory note is an engagement respecting property which a married woman may make, although it can be enforced only against her separate property. If she make such note for the accommodation of another, without receiving any consideration therefor, the note so made, in the hands of one who received it for value, is valid and binding upon her, though the holder knew how and why it was made. *Id.*

10. MARRIED WOMAN'S SEPARATE PROPERTY—CONVEYANCE OF.—Under section 1 of the act of 1871, relating to the separate property of married women, a married woman may convey her separate real estate, without her husband joining in the deed. *Woffenden* v. *Charaleau et al.* *Ariz.*, 727.

11. THE SAME—RENTS AND PROFITS—BONA FIDE PURCHASER FROM WIFE.—Under such act, the rents and profits of the separate estate of a married woman are common property. If she purchase real estate therewith, a subsequent *bona fide* purchaser thereof, from her, takes the same free from all claim of the husband. *Id.*

MASTER AND SERVANT.

See NEGLIGENCE, 14.

MEASURE OF DAMAGES.

See DAMAGES.

MECHANIC'S LIEN.

1. MECHANIC'S LIEN—STATEMENT OF DEMAND—CREDITS AND OFF-SETS.—A notice for a mechanic's lien is sufficient, although, in the statement of the demand, the words, "over and above all credits and effects," are substituted for the words "over and above all credits and off-sets," mentioned in the statute. *Merchant et al.* v. *Humeston et al.* *Wash.*, 452.

2. THE SAME—NOTICE OF LIEN—AMOUNT DUE FOR MATERIALS FURNISHED, HOW STATED.—A notice of lien set out that the lienor furnished materials used in the construction of seven certain dwelling houses situated on certain named lots, upon which there was due and unpaid the sum of seventy-nine dollars and fifty-six cents, and claimed a lien therfore, "in the proportion aforesaid," to wit, twelve dollars and seventy-four cents, upon each of the seven houses. *Held*, that the notice was insufficient, in the absence of an allegation that of the materials furnished twelve dollars and seventy-four cents worth, or any other certain amount, went into any particular house. *Id.*

3. LOGGER'S LIEN—COMPLAINT MUST ALLEGE AMOUNT DUE TO ORIGINAL CONTRACTOR.—The complaint in an act to enforce a lien alleged to have accrued under and by virtue of the act of March 30, 1878, entitled "an act giving a lien to loggers and laborers employed in logging camps, upon the logs cut and hauled by persons who employed them," does not state a cause of action, unless it be alleged that something was due from defendants to the original contractor when plaintiff's lien was filed, or that defendants were notified or had knowledge of the claim of plaintiff prior to the payment in full of the amount due to the original contractor under the contract. *Wilson* v. *Barnard et al.* *Cal.*, 407.

MINES AND MINING.

1. MINING PATENT—SETTING ASIDE FOR FRAUD.—Courts should be slow in disturbing the title conveyed by a United States patent to mining claims, for alleged fraud, when the facts as to the character of the ground, the kind of work and the amount done, are fully known to the officers of the government; and before they do it, should be cleary satisfied that the applicant has intentionally concealed material facts, or made false and fraudulent representations. *United States* v. *Iron Silver Mining Company.* (*U. S. Cir. Ct.*) *Col.*, 244.

2. PLACER CLAIM—WORK IN PROSPECTING FOR VEIN. Work done by an applicant for a placer patent in prospecting for a vein, may be counted as work done for the purpose of securing the placer claim. *Id.*

See PUBLIC LANDS, 4.

MISTAKE.

1. REFORMATION OF DEED—MISTAKE—EQUITABLE DEFENSE—FINDINGS.—In an action to recover certain lands, the answer alleged a mistake in drawing the deed from the plaintiff to the defendant, whereby the land sued for was excepted from its operation, when, according to the agreement of the parties, there was to be, and should have been, only a reservation of a temporary right of way over it. The answer admitted that the title to the land in controversy was still in the plaintiff, and asked that the deed be reformed so as to express the real agreement between the parties. *Held*, that if a mistake was made in drawing the deed, as alleged, that fact should have been found in clear and unmistakeable language, and, being found, would have constituted a defense to the action, whether the court went further and actually reformed the deed or not. *Walker* v. *Brem.* *Cal.*, 744.

See REFORMATION, 1.

MONEY PAID.

1. MONEY PAID UNDER CONTRACT—RECOVERY AFTER BREACH.—Money paid by plaintiff, under a contract, and in obedience to its requirements, may be recovered by him, upon the defendant's failure to perform. *Bullard* v. *Stone.* *Cal.*, 532.

MONTGOMERY AVENUE BONDS.

1. FEDERAL COURTS FOLLOW STATE COURTS IN CONSTRUING STATE STATUTES unless such construction conflicts with or impairs the efficiency of some principle of the federal constitution or of a federal statute, or a rule of commercial or general law. *Liebman* v. *City and County of San Francisco.* (*U. S. Cir. Ct.*) *Cal.*, 295.

2. THE CONSTRUCTION OF THE "MONTGOMERY AVENUE ACT" of April 1, 1872, of the California legislature, by the state supreme court, in Mulligan v. Smith, 59 Cal., 206, approved and followed. *Id.*

3. THE PETITION OF PROPERTY OWNERS FOR OPENING MONTGOMERY AVENUE in San Francisco, provided for in the California statutes of April 1, 1872, was essential to the validity of the proceedings, including the issue of the bonds authorized by the act, and the sufficiency of the petition must be affirmatively shown to maintain an action on the bonds, unless it can be conclusively presumed from the character of the bonds or their recitals. *Id.*

4. RECITALS IN MUNICIPAL BONDS, OF COMPLIANCE WITH THE STATUTE authorizing their issuance, estop the obligors from denying such compliance, as against *bona*

fide purchasers of the bonds, for value, and without notice of any defect in the proceedings. *Id.*

5. RECITALS IN MUNICIPAL BONDS MUST CLEARLY IMPORT COMPLIANCE with the statute authorizing them, in order to estop the obligors from showing that they were issued without authority of law. *Id.*

6. THE MONTGOMERY AVENUE BONDS CONTAIN NO SUFFICIENT RECITALS of compliance with the statute under which they were issued, the clause relied upon as a recital being a mere capton, and, at most, importing only that: "In conformity with the act," giving its title, "the treasurer will pay," that is, that he will pay out of the special fund provided for by the act. *Id.*

7. A CITY IS NOT ESTOPPED BY RECITALS IN BONDS NOT ISSUED BY IT, nor under its authority, but by, and under the name and seal of a distinct corporation composed of officers of the city, but acting independently of it, created by a special statute providing for the opening of a street in such city and deriving its powers wholly from such statute. Hence, the city and county of San Francisco is not bound by the recitals, if any, contained in the "Montgomery avenue bonds" issued by the board of public works, under the authority of the act of April 1, 1872. *Id.*

8. THE PARTY ACTUALLY LIABLE ON A BOND MUST HAVE HIS DAY in court, in person, or by his representative, before there can be any binding judgment determining its validity as against him and his property. *Id.*

9. A CITY CANNOT BE SUED ON BONDS NOT ISSUED BY IT, and upon which the statute authorizing their issue declares that it shall not be liable, merely for the purpose of establishing their validity, so as to obtain a mandamus to compel the levy of the tax provided by the statute for their payment; as where a special statute providing for the opening of a street in a city created a board, to be composed of certain city officers and known as the board of public works, and authorized the board to issue bonds to pay for the land taken, the bonds to be paid out of a special tax upon the property benefited by the street, and declared that the city should not be liable on the bonds "in any event whatever," and that the holders should take the bonds on that condition, and the bonds were issued accordingly. *Id.*

10. THE MONTGOMERY AVENUE BONDS ARE NOT BONDS OF THE CITY AND COUNTY OF SAN FRANCISCO, and the municipality, in its corporate capacity, does not stand in any such relation to these obligations, as renders it liable to be sued upon them for any purpose. *Id.*

11. OPENING MONTGOMERY AVENUE NOT A CORPORATE ACT.—The opening of Montgomery avenue, and dedicating it to public use, under the statute, in question, is not a corporate act, but, an act performed by the state, through its own instrumentalities. *Id.*

12. THE BOARD OF PUBLIC WORKS, created by the act, is a board created by the state, to perform a specific service, under the statute, but is not a branch of the municipal government. *Id.*

13. THE MONEYS TO BE ASSESSED, upon the property benefited, for opening Montgomery avenue, constitute no part of the corporate funds of the city. *Id.*

14. WHO NOT CITY OFFICERS.—Parties performing duties, by authority of a special statute, without the authority of a municipal corporation, and not acting by virtue of any power conferred on the corporation by its charter or otherwise, do not act as officers, or agents, of the corporation; and the corporation, not being the principal, their acts, so performed, are not the acts of the corporation. *Id.*

MORTGAGE.

1. "SUBJECT" OF AN ACT AND "MATTER PROPERLY CONNECTED THEREWITH"—TWO-COUNTY MORTGAGE VOID.—The clause in section 3 of the act of October 26, 1882, Ses. Laws, 65, commonly called "the mortgage tax law," which declares that all mortgages or other obligations whereby land in more than one county "is made security for the payment of a debt, is void," is a "matter properly connected" with the "subject" of the act, and, therefore, not in contravention of section 20 of article iv. of the constitution of the state; and a mortgage executed by the defendant to the plaintiff, as trustee, of its road and property in several counties in Oregon, to secure the payment of certain bonds of the same date, in violation thereof, is void

and of no effect. *Farmers' Loan and Trust Company* v. *Oregon and California Railway Company.* (*U. S. Cir. Ct.*) *Or.*, 239.

2. CONSTRUCTION OF STATUTE.—A plain provision of a statute cannot be construed so as to exclude a particular case from its operation upon a surmise or conjecture, however probable, that the legislature did not actually contemplate or consciously intend its application thereto. *Id.*

3. INSTALMENT OF INTEREST—LIEN OF MORTGAGE MAY BE ENFORCED FOR.—When a debt payable at a future day, with interest payable in the meantime, at stated intervals, is secured by mortgage, and default is made in the payment of an instalment of such interest, a suit in equity may be maintained to enforce the lien of such mortgage, so far as such instalment is concerned, by a sale of so much of the mortgaged property as may be necessary to pay the same; but if such property cannot be sold in parcels without injury to the parties, or one of them, then the court may order the whole of it sold, free from the lien of the mortgage, and apply the proceeds on the whole debt according to its then value. *Id.*

4. BILL OF SALE—MORTGAGE—PRE-EXISTING DEBT—DISCHARGE OF INDEBTEDNESS.—In determining whether a bill of sale of personal property, based upon a previously existing debt, was absolute, or intended merely as a mortgage, the question to be settled is, whether the intention of the parties was to cancel the debt, or to secure it; this is a question of fact to be determined by the negotiations had at the time, and the subsequent acts of the parties. In determining this question, a person who was present at the time the bill of sale was made, may testify to what he knew of the transaction. *Cook* v. *Lion Fire Insurance Company.* *Cal.*, 366.

5. THE SAME—INSURANCE—REAL OWNER OF PROPERTY INSURED.—At the time of the making of the bill of sale in question, plaintiff's vendor was indebted to him, and was desirous of obtaining more money. He, thereupon, offered to sell him a certain fifteen hundred cords of wood, in payment of the money which was due, and was about to be procured. The bill of sale of the wood was accordingly executed, upon such consideration, and the plaintiff immediately took possession, and had it insured in his own name. The application for insurance stated that the plaintiff was the sole owner of the property. Subsequently the plaintiff took another bill of sale for the same wood, from his vendor. At the time of the first bill of sale, it was agreed, in writing, between the parties, that the plaintiff would sell, to his vendor, the wood, if, by a certain date, the latter paid him the sum of one thousand eight hundred dollars. *Held*, that the whole contract was an absolute sale, with the privilege to repurchase reserved to the vendee; that the vendee was the sole owner of the wood, and was not guilty of a breach of warranty in representing himself as such in his application for insurance. *Id.*

6. MORTGAGE—FORECLOSURE OF—ENFORCEMENT OF DEBT.—Under section 726, of the code of civil procedure, whatever the form of the debt, a mortgagor can be legally compelled to pay no part of it until a decree is entered for the sale of the mortgaged premises, and the liability which shall then accrue to him is a liability to pay only a deficiency which shall appear on the sheriff's return. *Brown* v. *Willis.* *Cal.*, 211.

7. FORECLOSURE OF MORTGAGE—PERSONAL JUDGMENT AGAINST GRANTEE OF MORTGAGOR.—In a complaint to foreclose a mortgage, an allegation, that the grantee of the mortgagor covenanted and agreed to pay the mortgage debt and discharge the mortgage lien, is sufficient to sustain a personal judgment against him. *Pellier* v. *Gillespie.* *Cal.*, 624.

8. THE DESCRIPTION OF THE MORTGAGED PROPERTY CONSIDERED and held sufficient. *Id.*

9. FORECLOSURE OF MORTGAGE—NO REDEMPTION FROM SALE.—Property sold under a decree of the district court, to satisfy a mortgage, is not subject to redemption under the act of 1873. Doubtless, a court of equity may impose, as a condition of sale, the right of the mortgagor to redeem upon proper conditions within a certain time. But, in the absence of any such condition in the decree of foreclosure, the sale is absolute. *Parker* v. *D'Acres et al.* *Wash.*, 549.

10. RIGHT TO REDEEM, BARRED IN TWO YEARS.—The right of a mortgagor, to redeem from a foreclosure sale, conceding it to exist, is barred in two years, under section 33 of the code. *Id.*

11. MORTGAGE—FORECLOSURE—RENTS AND PROFITS.—PURCHASER AT SHERIFF'S SALE.—A mortgagee, who purchases the mortgaged property at a foreclosure sale, is not entitled to receive any of the rents and profits which accrued prior to the time of his

purchase. Nor can he maintain an action against a receiver of such property, for the rents and profits, until they have been collected and received by him. *Pendola* v. *Alexanderson et al.* *Cal.*, 330.

12. MORTGAGE—AFTER ACQUIRED TITLE—FORECLOSURE.—When a mortgage of land is made, purporting to convey the land in fee, any title afterwards acquired by the mortgagor will feed the mortgage and inure to the benefit of the mortgagee. And this is so, although the title, when the mortgage was made, was in the government, and was afterwards acquired by patent from the government, after a foreclosure of the mortgage. *Orr* v. *Stewart.* *Cal.*, 217.

13. HOMESTEAD ENTRY—MORTGAGE OF NOT VOID.—Section 2,296 of the United States revised statutes, concerning homesteads, does not prevent the voluntary mortgage by the grantee of his homestead entry. *Id.*

See TAXATION, 1, 3.

MURDER AND MANSLAUGHTER.

1. MURDER AND MANSLAUGHTER.—The distinctions between murder, in the first and second degree, and manslaughter, stated and commented upon. *United States* v. *Kie.* (*U. S. Dist. Ct.*) *Alaska*, 15.

2. MURDER—INDICTMENT—DELIBERATE AND PREMEDITATED MALICE.—Under section 786 of the code, an indictment for murder in the first degree must allege, in direct language, that the killing was done purposely and of deliberate and premeditated malice. An inferential averment of such facts is not sufficient. *Leonard* v. *Territory.* *Wash.*, 470.

3. THE SAME—DEFENDANT SERVED WITH INDICTMENT—RECORD.—In a prosecution for murder, the record need not show that the defendant was served with a copy of the indictment before trial. *Id.*

4. THE SAME—FORM OF OATH.—An oath administered to a trial jury, in a prosecution for murder or manslaughter, "to well and truly try and true deliverance make between the territory and the prisoner at the bar whom they shall have in charge, according to the law and the evidence as given them on the trial," is a sufficient compliance with section 1,084 of the code. *Id.*

5. CRIMINAL LAW—MURDER—INSTRUCTIONS NOT BASED ON EVIDENCE.—In a prosecution for murder, the refusal of the court to give instructions relating to self-defense, and to homicide committed by accident or misfortune upon a sudden combat, is not error, if there is no evidence upon which such a defense can rest. *People* v. *Mann.* *Cal.*, 361.

6. THE SAME—EVIDENCE OF CHARACTER OF DECEASED INADMISSIBLE.—In such prosecution the defense cannot give evidence of the character of the deceased for peace and quietness. *Id.*

7. THE SAME—EXPERT TESTIMONY—BLOW STRUCK BY FIST.—Where the theory of the prosecution is that death resulted from a blow struck by the fist of the defendant, a medical expert can testify, whether, in his opinion, the fracture of the head of the deceased could have been produced by a blow from a man's fist. *Id.*

8. MURDER IN FIRST DEGREE—ERRONEOUS INSTRUCTION WHEN IMMATERIAL.—Where a defendant is convicted of murder in the first degree, an erroneous instruction as to whether a homicide committed without deliberation is murder in the second degree, or manslaughter, is without prejudice to the defendant, and therefore no ground for reversal. *People* v. *O'Neil.* *Cal.*, 369.

9. THE SAME—DEFENDANT WITNESS IN OWN BEHALF—INSTRUCTIONS AS TO WEIGHT OF EVIDENCE.—In a prosecution for murder, where the defendant offers himself as a witness in his own behalf, the court may instruct the jury, that, in considering the weight and effect to be given to his evidence, they should consider his relation and the situation under which he gives his testimony, the consequences to him relating from the result of the trial, and all the inducements and temptations which would ordinarily influence a person in his situation. *Id.*

10. MURDER—INSTRUCTIONS—INTENTION PRESUMED FROM ACT.—In a prosecution for murder an instruction that "every person is presumed to intend what his acts indicate his intention to have been; and if the defendant fired a loaded pistol at the deceased and killed him, the law presumes that the defendant intended to kill the

deceased; and unless the defendant can show that his intention was other than his act indicated, the law will not hold him guiltless," is not erroneous. The words "unless the defendant can show" cannot be construed as requiring the defendant to show, by evidence adduced by himself, what his intention was. *People* v. *Langton*. *Cal.*, 413.

11. THE SAME—DRUNKENNESS OF DEFENDANT.—As between murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry, for manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation. *Id.*

12. MURDER—DUTY OF JURY AS TO FIXING PUNISHMENT—INSTRUCTIONS.—In a prosecution for murder, the jury, after agreeing to find the defendant guilty of murder in the first degree, were unable to agree upon the punishment; they, thereupon, came into court, and the judge instructed them that they had the right to fix the penalty at death, or imprisonment for life, or to bring in a verdict of guilty of murder in the first degree without specifying the penalty; the jury subsequently returned for further instructions, when the court charged them: "If there is nothing specified in your verdict as to the penalty, the court will have its duty to perform, but what the duty will be, the court will not say." *Held*, that the instructions were without error; that the jury could not have been misled by the failure of the court to inform them that its duty would be to sentence the defendant to death, if the verdict did not fix the penalty. *People* v. *French*. *Cal.*, 423.

13. THE SAME—EVIDENCE AFFECTING THE CREDIBILITY OF WITNESS.—In such case, where a witness for the defendant is cross-examined as to a conversation had by him, for the purpose of affecting his credibility, if the defendant understood that such evidence was admitted on any other ground, or was apprehensive that it might be used for any other purpose in the case, he should ask the court, by a proper instruction, to limit it to the question of the credibility of the witness. *Id.*

14. THE SAME—MEANING OF WORDS USED BY ANOTHER—STRIKING OUT EVIDENCE.—A witness cannot testify to his understanding of the meaning of words used by another. But, if he does so, it is not error if the court orders the answer stricken out, and instructs the jury not to consider it. *Id.*

15. CRIMINAL LAW—THREATS AGAINST BROTHER OF DECEASED—EVIDENCE OF INADMISSIBLE.—In a prosecution for murder, evidence of threats made by the defendant against the brother of the deceased, in the absence of any evidence connecting such threats with the injury inflicted on the deceased, is inadmissible. *People* v. *Bezy*. *Cal.*, 173.

16. THE SAME—EVIDENCE AS TO CHARACTER OF DECEASED FOR PEACE.—On a trial for murder, the prosecution cannot give evidence as to the character of the deceased for peace and quietness. *Id.*

17. THE SAME—OPENING STATEMENT FOR DEFENDANT.—It is within the discretion of the court, on such trial, to restrict the counsel for the defendant, in his opening statement, to stating what he expects to prove, without any argument upon such facts. *Id.*

18. FAILURE OF DEFENDANT TO DISPROVE CIRCUMSTANCES—INSTRUCTIONS.—An instruction "that the fact that defendant does not disprove circumstances proved before them will give additional weight to such circumstances as are proved, if the jury believe the defendant has the means of disproving them if they be false," is erroneous, because it assumes that circumstances have been proved, and because the jury might infer that the failure on the part of the defendant himself to testify would operate against him. *Leonard* v. *Territory*. *Wash.*, 470.

19. AN INSTRUCTION AS TO WHAT CONSTITUTES MURDER IS ERRONEOUS if it omits all reference to justifiable or excusable homicide; or does not make malice necessary to murder in either degree; or does not charge that, in order to constitute murder in the first degree, the malice, and not merely the killing, must be deliberate and premeditated. *Id.*

See EVIDENCE, 2, 3.

NAVIGABLE STREAM.

1. NAVIGABLE STREAM—PUBLIC HIGHWAY—OBSTRUCTING ACCESS TO—INJUNCTION.—A navigable stream is a public highway, and an owner of land bordering thereon

has a right of free access to such highway. Such right is a vested right and privilege belonging to him, of which he cannot be deprived without compensation. Any interference with the enjoyment of such right, as by the erection of a wharf, cutting off access to such highway, is a nuisance, and will be restrained by injunction. *Shirley et al.* v. *Bishop et al.* *Cal.*, 578.

NEGLIGENCE.

1. NEGLIGENCE—DUTY TO KEEP PREMISES IN REPAIR—PRESUMPTIONS.—Whenever it is a defendant's duty to keep premises in a proper condition, as respects persons passing, and they are out of condition, and an accident happens, it is incumbent upon the defendant to show that he used that reasonable care and diligence that he was bound to use; and the absence of that care may fairly be presumed from the fact that there was the defect from which the accident had arisen. *Cunningham* v. *Union Pacific Railway Co.* *Utah*, 445.

2. EVIDENCE—WHEN CASE MUST BE LEFT TO JURY.—When the evidence has a tendency to make out a proper case in all parts, although, in the opinion of the trial court, it may be slight, inconclusive and far from satisfactory, yet it should be submitted to the jury, whose province it is to consider and determine its tendency and weight. *Id.*

3. CONTRIBUTORY NEGLIGENCE—SITTING DOWN IN MINE.—A miner is not, as a matter of law, guilty of contributory negligence, in sitting down in a gangway, which it was the duty of his employer to keep in a safe condition, and which he did not know was unsafe. *Id.*

4. NEGLIGENCE—EXHIBITING INJURY TO JURY.—In an action to recover for a bodily injury, caused by the defendant's negligence, the plaintiff may exhibit the injured portion of his body to the jury. *Id.*

5. THE SAME—UNSAFE CONDITION OF MINE—LIABILITY OF MASTER.—Where it is the duty of a mine owner to keep his mine in a safe condition, and an injury happens to an employee, by reason of a failure so to do, the rule which exempts the master from liability for injury to a servant, caused by the negligence of a fellow servant, does not apply. *Id.*

6. NEGLIGENCE—GENERAL ALLEGATION—EVIDENCE OF PARTICULARS.—Under a general allegation of negligence, the circumstances constituting it may be proved, even though other circumstances particularily specified in the complaint are unproved. *Id.*

7. NEGLIGENCE—RAILROAD—FIRE ESCAPING FROM LOCOMOTIVE—DAMAGES CAUSED BY SPREADING FIRE.—Whether the fact that a fire, negligently started in the field of one man, and extending to that of another, would establish *prima facie* that the damage done in the second field was an ordinary and natural result of the defendant's negligence, not determined. That is a question to be determined by the jury, in view of all the circumstances proved. Such damage might be an ordinary and natural consequence. *Butcher* v. *Vaca Valley Railroad Co.* *Cal.*, 562.

8. THE SAME—EVIDENCE OF ORIGIN OF FIRE—VARIANCE.—In an action against a railroad company to recover damages for fire, caused by sparks which it negligently permitted to escape from its locomotive, evidence that the fire commenced on land adjoining that of the plaintiff, and extended to his lands, is admissible under an allegation that the fire from the defendant's locomotive "was suffered to escape, and did escape, and by reason thereof, came upon the land of the plaintiff." *Id.*

9. THE SAME—EVIDENCE OF LIKE FIRES ADMISSIBLE.—On the trial of such action, a witness may testify that shortly after the fire complained of, at a place from a quarter to one half a mile distant, he saw a fire in a field near the defendant's road, just after a train of cars had passed, drawn by the same engine from which, as claimed, the fire escaped which caused the damage sustained by plaintiff. *Id.*

10. THE SAME—PRESUMPTION OF NEGLIGENCE—FAULTY CONSTRUCTION OF ENGINE.—In such a case, a presumption of negligence is raised if it appear that the engine from which the fire escaped, was not built so as to retain its sparks; or was otherwise of faulty or insufficient construction; and evidence that, shortly after the fire, certain repairs were made on the spark-retaining apparatus of the engine, is admissible to show that it was so built. *Id.*

11. NEGLIGENCE—CONTRIBUTORY—REASONABLE CARE.—To authorize a recovery for damages occasioned by the negligence of another, the plaintiff must have exercised that reasonable degree of care to avoid the injury which an ordinary prudent person would have exercised, under like circumstances. *Dufour* v. *Central Pacific Railroad Company*. *Cal.*, 345.

12. THE SAME—PLAINTIFF'S DEGREE OF CARE.—In actions to recover for such negligence, it is necessary for the plaintiff to make out a *prima facie* case in his favor, showing that the damages claimed by him resulted from the negligence of the defendant. And where it affirmatively appears from his own evidence that the want of due prudence on his part was the proximate cause of the injury complained of, he cannot recover. But the plaintiff's right to recover is not affected by his having contributed to his injury unless he was in fault in so doing. *Id.*

13. THE SAME—CASE IN JUDGMENT.—Plaintiff's decedent was employed by a lumber company to load lumber upon a car placed by defendant on a side track to receive its load. Before the accident happened, all the load of lumber had been placed on the car, but it had not been leveled off and secured in place so as to be fit for shipment. Decedent and his assistant were standing on the projecting ends of the longer timbers, at opposite ends of the car, leveling off the load, and preparing to fasten the same in place, when defendant's employees, without giving any notice, ran up with a locomotive engine, coupled on to the train in which the car was standing, and had moved several hundred feet, and had acquired a speed of five or six miles an hour, when two heavy jerks of the car occurred, the latter of which threw decedent from the ends of the lumber on which he was standing, between the cars, where he was killed. The time consumed in passing from the starting point to where the accident occurred was from a minute to a minute and a half. *Held*, that the court could not say as a question of law, that decedent was guilty of contributory negligence, in maintaining, as best he could, his position on the ends of the lumber, and in not climbing on top of the load. *Id.*

14. NEGLIGENCE—EMPLOYER AND EMPLOYEE—EXEMPLARY DAMAGES. — Whether an employer, such as a railroad company, is liable in exemplary damages, for an injury caused by the malicious or willful misconduct of its employee, *quære?* *Sullivan* v. *O. R. & N. Co.* *Or.*, 106.

15. PARTY ASSUMING RISK OF KNOWN DANGER.—Where an employee in a mining tunnel knows that the roof of the tunnel at a given point is in an unsafe condition, and with such knowledge engages in the work of making it safe, voluntarily, sits down to rest himself under the dangerous point during a suspension of his work, and, while so seated, is killed by the falling of the roof upon him, the owners of the tunnel are not liable to an action for his death in favor of the surviving wife and children. *Bunt* v. *S. B. G. M. Co.* (*U. S. Cir. Ct.*) *Cal.*, 437.

NEW TRIAL.

1. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.—A new trial, on the ground of newly discovered evidence, will not be granted, if such evidence be merely cumulative. *Reed* v. *Drais.* *Cal.*, 523.

2. NEW TRIAL—INSANITY—EVIDENCE.—The evidence of the defendant's insanity, upon which a motion for a new trial was based, considered and held insufficient. *People* v. *O'Neil.* *Cal.*, 369.

3. NEW TRIAL—ERRORS OF LAW WAIVED IF NOT SPECIFIED.—Where a notice of motion for a new trial states that it would be made on errors of law, and no errors are specified, the court will presume that they were disregarded, in accordance with section 659, subdivision 3, of the code of civil procedure. *Pico* v. *Cohn et al.* *Cal.*, 208.

4. THE SAME—INSUFFICIENCY OF EVIDENCE—DISCRETION—ABUSE OF—APPEAL.—A motion for a new trial on the ground of insufficiency of the evidence to justify the verdict or decision, is addressed to the sound legal discretion of the court below; and on appeal from an order granting a new trial the supreme court will not reverse the order, unless it appears that there has been a manifest abuse of discretion. No such abuse is shown in this case. *Id.*

5. NEW TRIAL—NOTICE OF—TIME FOR CANNOT BE EXTENDED.—The right to move for ne trial is statutory, and no power is given to the superior court, or a judge

thereof, to extend the time for giving notice of such motion beyond the period limited by section 659 of the code of civil procedure. *Brickman* v. *Ross*. *Cal.*, 748.

6. THE SAME—OBJECTION THAT NOTICE WAS NOT GIVEN IN TIME.—Objection that a notice of motion for a new trial is not given in time must be taken in the court below, or it will be deemed to have been waived, and the time extended by consent of parties; and such objection cannot be raised for the first time in the supreme court. *Id.*

7. NEW TRIAL—NOTICE OF—FAILURE TO GIVE NOTICE OF DECISION.—A notice of motion for a new trial, made twelve days after the decision, is in time, under section 659 of the code of civil procedure, if it appears that no notice of the decision was ever served on the party moving, or his attorney. *Carpenter* v. *Hewel*. *Cal.*, 782.

8. MOTION FOR NEW TRIAL MUST BE DIRECTED TO DECISION.—A motion for a new trial cannot be based on the ground of the insufficiency of the evidence to justify the judgment, nor on the ground that the judgment is against law. The motion should be directed at the decision, and not the judgment. *Boston Tunnel Co.* v. *McKenzie et al.* *Cal.*, 528.

9. THE SAME—FORM OF SPECIFICATION OF GROUND.—A specification of ground for asking for a new trial, as follows: "Insufficiency of the evidence herein to support or justify the findings of the court," is sufficient in form and directed to the decision, as required by section 657, code of civil procedure. *Id.*

10. NEW TRIAL—NOTICE OF, WAIVES NOTICE OF DECISION.—Notice of the decision is presumed to have been waived, if the beaten party files and serves a notice of intention to move for a new trial. *Girdner et al.* v. *Beswick*. *Cal.*, 511.

11. NOTICE OF NEW TRIAL MUST BE FILED IN TIME.—A notice of intention to move for a new trial is unavailing, if not filed within the time limited by section 659 of the code of civil procedure. *Id.*

12. ORDER GRANTING NEW TRIAL.—INTENDMENTS IN FAVOR OF ON APPEAL.—On an appeal from an order granting a new trial the appellant must make it affirmatively appear that error, or abuse of discretion, has been committed in granting the order. Neither will be presumed. Every intendment is in favor of the order, and unless that is overcome by something in the record of the case upon which the order was made, or unless it has been made upon some proposition, which, considered in itself, is prejudicially erroneous, the order must be affirmed. *Lewis, Executrix, etc.* v. *Adams*. *Cal.*, 352.

13. NEW TRIAL—DISMISSAL OF MOTION—LACK OF DILIGENCE IN PROSECUTING.—Defendants, on May 26, 1884, filed with the clerk a statement on motion for a new trial. The statement thus filed, was not settled, allowed or certified, and, on October 4, 1884, the court, on motion of plaintiffs, dismissed the proceedings on motion for new trial, for want of diligence in prosecuting it. On December 3, 1884, the defendants, without notice to the plaintiffs, moved the court to set aside the order of October 4, 1884. *Held*, that such motion was properly denied. *Greehn et al.* v. *Marker et al.* *Cal.*, 360.

14. UPON A CONSIDERATION OF THE EVIDENCE, *held*, that the judgment and order denying a new trial should be affirmed. *Kelly* v. *Brown*. *Cal.*, 556.

15. WHERE THE EVIDENCE IS CONFLICTING, AN ORDER refusing a new trial will not be disturbed. *Page* v. *Rodney*. *Wash.*, 548.

See APPEAL, 28; FINDINGS, 3.

NONSUIT.

See EJECTMENT, 3; VERDICT, 1.

NOTICE.

See ADVERSE POSSESSION, 5; APPEAL, 16, 17, 19, 20, 24; CHECK, 1; CORPORATIONS, 2.

NUISANCE.

See NAVIGABLE STREAM, 1; WATER AND WATER RIGHTS, 7.

OPINION.

See EVIDENCE, 14.

OUSTER.

See EJECTMENT, 2.

PARTITION.

See APPEAL, 19.

PARTNERSHIP.

1. PARTNERSHIP—ONE FIRM UNDER SEVERAL NAMES.—Where the same persons engage in carrying on the same business in several places, under different firm names, they constitute but one partnership, and the assets of both nominal firms are equally applicable to the payment of all the creditors. *Campbell, Intervenor, etc.*, v. *Colorado Coal and Iron Co. Col.*, 32.
2. PARTNERSHIP—ACTION BETWEEN PARTNERS—ACCOUNTING.—One partner cannot sue his co-partner, in an action at law, to recover his proportion of the partnership adventures, until there has been an accounting between them. *Fisher* v. *Sweet. Cal.*, 174.
3. THE SAME—EVIDENCE OF PARTNERSHIP DISBURSEMENTS.—In an action at law or in equity, if plaintiff offer evidence tending to show that defendant had received moneys growing out of their adventures (whether as joint owners or as copartners), the defendant is entitled to show that such moneys had been disbursed in the due course of the business; and that, whether the disbursements had been made by the defendant in person, or by a mercantile firm of which he was a member. *Id.*
4. PARTNERSHIP—LAND PURCHASED WITH PARTNERSHIP FUNDS—TRUSTS.—Where one partner, having partnership funds in his possession, to be used for partnership purposes, without the consent of his co-partner invests the same in land for himself, taking the title in his own name, the co-partner may demand an interest in the realty purchased, corresponding in extent with his interest in the money paid therefor. And a court of equity, in such case, will recognize the resulting trust, even though the partner thus appropriating the partnership funds, intended to account therefor upon final settlement, and was innocent of any fraudulent intent. *Kayser* v. *Mangham. Col.*, 21.
5. REHEARING DENIED, for reasons stated in the opinion. *Id.*

PATENTS.

1. PATENTS FOR INVENTIONS—PRIOR RECOVERY.—In an action at law, by a patentee, to recover damages for the use of a patented article, an answer which sets up, that the article used was purchased by defendant from a manufacturer, against whom the patentee had brought a suit in equity, and obtained a decree for an accounting, in which accounting and decree the article in question was included, does not state a defense, unless there is a further allegation, that the decree against the manufacturer has been satisfied by payment, or otherwise. *Fisher et al.* v. *Consolidated Amador Mine, etc.* (*U. S. Cir. Ct.*) *Cal.*, 451.

PAWNBROKERS.

1. PAWNBROKERS—ACT LIMITING RATE OF INTEREST CONSTITUTIONAL—SPECIAL LEGISLATION.—The act of March 7, 1881, amending section 340 of the penal code, and prohibiting pawnbrokers from charging a larger rate of interest than two per cent per month on loans made by them, is not a special law, and, consequently, is not in conflict with the provision of article iv., section 25, of the constitution of 1879, which prohibits the legislature from passing any local or special law regulating the rate of interest on money. *Ex parte Lichenstein, on Habeas Corpus. Cal.*, 287.

PLEADINGS AND PRACTICE.

1. AVERMENTS OF COMPLAINT—WHEN NOT BINDING ON PARTY.—A party to an action is not bound by the averments of a complaint in another action to which he is not a party. *Mellus* v. *Mellus*. *Cal.*, 497.

2. THE RECORD HELD TO SHOW NO ERROR. *Id.*

3. PLEADING—DENIAL OF CONTRACT SUED ON.—Where the contract, for the breach of which an action is brought, is set out in the complaint, an issue is raised by the defendant's denying such contract. He need not affirmatively allege the contract as he understands it. *Puget Sound Iron Company* v. *Worthington Bros.* *Wash.*, 480.

4. FRAUD—RESCISSION OF CONTRACT—ALLEGATIONS OF COMPLAINT.—In an action to compel the reconveyance of land, the plaintiff must aver his willingness to restore to the defendant the consideration paid by him. *Potter et al* v. *Roeth*. *Cal.*, 373.

See AMENDMENT; APPEAL; CHECK; COUNTER CLAIM; DEMURRER; EJECTMENT, 4-7; FENCES, 3, 5; INJUNCTION, 5, 6; INTEREST, 1; INTERVENTION; JUDGMENT; MARRIED WOMEN, 1-3; MECHANIC'S LIEN, 3; PROMISSORY NOTE; QUIETING TITLE; SLANDER, 1.

POINTS AND AUTHORITIES.

1. JUDGMENT AFFIRMED FOR FAILURE OF APPELLANT to file points and authorities. *Whitmore* v. *Henderson*. *Cal.*, 251.

2. JUDGMENT AFFIRMED FOR FAILURE OF APPELLANT to file points and authorities. *McCauley* v. *Cunningham*. *Cal.*, 250.

3. JUDGMENT AFFIRMED FOR FAILURE OF THE APPELLANT to file points and authorities. *Cleghorn* v. *Cleghorn*. *Cal.*, 250.

4. MOTION TO STRIKE OUT BRIEF FOR NONCOMPLIANCE with rules viii. and ix., denied. *Carroll* v. *Andrews*. *Wash.*, 458.

5. CERTIFICATION OF TRANSCRIPT—FILING BRIEF—WRIT OF ERROR.—A writ of error will be dismissed if the transcript be not properly certified, or if the brief of plaintiff in error be not filed within the time prescribed by rule 10 of the supreme court. *Lewis* v. *Hart*. *Wash.*, 486.

POLYGAMY.

1. POLYGAMY—INDICTMENT—OFFENSE HOW ALLEGED.—An indictment for polygamy is sufficient if it charges the crime substantially in the language of the statute defining the offense. And the addition of language reciting cohabitation after charging polygamy, and as following the polygamous marriage, could not mislead, or injuriously affect the defendants, and is immaterial. *United States* v. *Tensey*; *United States* v. *Kemp*; *United States* v. *Christofferson* *Ariz.*, 720.

2. EVIDENCE OF GENERAL REPUTATION IS ADMISSIBLE IN CORROBORATION, to prove a polygamous marriage or unlawful cohabitation. *Id.*

3. THE SAME—EVIDENCE OF PRIOR RELATION BETWEEN DEFENDANT AND WIVES.—On a trial of such indictment, evidence of the relation which existed between the defendant and his alleged polygamous wives, prior to date charged in the indictment, is admissible, on the part of the prosecution, especially if such evidence is first introduced by the defendant. *Id.*

4. THE SAME—REFRESHING MEMORY FROM CENSUS RETURN.—A witness, who had been a census enumerator, may examine and refer to the census return filed by him, to refresh his memory in regard to the names and numbers of the defendant's family at the time he took such census. *Id.*

5. THE SAME—STATUTES OF TERRITORY WHEN REGULATE PROCEDURE.—In a court with jurisdiction over offenses for violations of an act of congress, where the United States statutes are silent as to matters of practice, method of proof and procedure, territorial statutes may be invoked and applied to the case. Thus, the United States statutes being silent as to what shall constitute, as well as the method of proving marriage, the statute of the territory on that subject may be resorted to and applied. *Id.*

See UNLAWFUL COHABITATION.

POSSESSION.

See ADVERSE POSSESSION; DEED, 1; EJECTMENT, 2; INSURANCE, 3; LARCENY, 1; QUIETING TITLE, 3; SALE, 2, 8, 9.

PRESCRIPTION.

See BOUNDARIES, 2.

PRESUMPTIONS.

See JURISDICTION, 1, 2; LARCENY, 1; MARRIED WOMEN, 4; NEGLIGENCE, 1; TRUSTS, 2.

PROMISSORY NOTES.

1. PROMISSORY NOTE—ACTION BY ACCOMMODATION MAKER—ALLEGATION OF COMPLAINT—REQUEST—DEMAND.—In an action by an accommodation maker of a promissory note, who signed the same as surety only, to recover the amount paid by him to the payee, the plaintiff need not allege or prove that he paid the note at the request of the defendant, for whose accommodation it was made. Upon such payment being made, the law casts a liability for repayment upon the defendant, and raises an implied promise on his part to reimburse the plaintiff; and suit brought is a sufficient demand. *Clanton* v. *Coward*. *Cal.*, 363.

See MARRIED WOMEN, 8, 9.

PUBLIC LANDS.

1. UNITED STATES PATENT—WHEN CAN BE COLLATERALLY ATTACKED.—If, under any assumed state of circumstances, a United States land patent can be valid, it cannot be attacked in a collateral proceeding, or in any manner, except by direct action to set it aside, either by the United States, or by the person who has succeeded to its right. *Terry* v. *Street*. *Utah*, 320.
2. THE SAME—VALENTINE SCRIP—VALIDITY OF PATENT UNDER.—A United States patent to land, entered under the so-called Valentine scrip, is not void, so as to be open to collateral attack, either by reason of the fact that the land was found, after survey, to be included within a sixteenth section, or was mineral in its character, or, at the time of the application of the scrip, was occupied by squatters. *Id.*
3. PATENTS TO LAND—UNAUTHORIZED RESERVATION IS VOID.—Where a United States patent to land, contains a reservation or condition not authorized by law, such reservation or condition is void. *Clary* v. *Hazlett et al.* *Cal.*, 257.
4. PLACER PATENT—RESERVATION OF VEIN OR LODE IS VALID.—Under section 2,338, of the United States revised statutes, the usual reservation contained in patents to placer claims, viz.: "That should any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed or known to exist within the above described premises, at the date thereof, the same is expressly excepted and excluded from these presents"—is authorized and valid. As to such vein or lode, no title vests in the placer patentee. *Id.*
5. FINAL LOCATION OF RAILROAD LAND GRANT.—Suggestion as to when location becomes definitely fixed, under the Union Pacific Railroad grant, so as to perfect the right of the grantee to the land. *U. S.* v. *McLaughlin*. (*U. S. Cir. Ct.*) *Cal.*, 431.

PUBLIC OFFICERS.

See ELECTION, 7–10.

REAL PROPERTY.

See CORPORATIONS, 10.

QUIETING TITLE.

1. SUIT TO QUIET TITLE—PARTIES.—Where a number of persons claim undivided interests in real property, adversely to one in possession of the same, the latter may

SALE.

1. A CONTRACT FOR THE MANUFACTURE OF CHARCOAL is not a contract of sale, and need not be in writing. *Puget Sound I. Co.* v. *Worthington. Wash.*, 480.

2. CONDITIONAL SALE—TITLE RETAINED BY VENDOR—PERFORMANCE OF CONDITION.—The vendee, in possession under a conditional sale, by the terms of which the title was to remain in the vendor, until payment of the purchase price, cannot sell the property, so as to pass title to the purchaser, until the condition has been performed. *Russell et al.* v. *Harkness. Utah*, 452.

3. ARTICLE TO BE SATISFACTORY TO PURCHASER.—Where a contract is made, to make and deliver an article which shall be satisfactory to the purchaser, the article must be satisfactory to him, or he is not bound to take it. *Silsby Manufacturing Co.* v. *Town of Chico.* (*U. S. Cir. Ct.*) *Cal.*, 440.

4. IT IS NOT SUFFICIENT THAT IT OUGHT TO BE SATISFACTORY.—It must, in fact, be satisfactory. *Id.*

5. BAD FAITH IN PARTY TO BE SATISFIED.—Where the party to be satisfied, is in fact satisfied, but in bad faith, and in fraud of the rights of the other contracting party, declares, that he is not satisfied, the contract has been fully performed and the purchaser is bound to accept the article contracted for. *Id.*

6. COMMITTEE TO BE SATISFIED.—Where a steam fire engine was contracted for, to be satisfactory to the fire committee of the town, and there was a change in the members of the committee after the contract was made, and before the tender of the engine, under it; *Held*, that the committee to be satisfied, is the committee existing at the time of the performance of the contract, and tender of the engine. *Id.*

7. TRANSFER OF PERSONAL PROPERTY — CONSIDERATION — FRAUD ON CREDITORS — CHANGE OF POSSESSION.—A transfer of property, in consideration of a promise by the transferee to use it in a certain manner, which would confer pecuniary profit on the transferor, is founded upon a sufficient consideration, and is not fraudulent as to the creditors of the latter, if the transfer be accompanied by an actual, immediate and continued change of possession. *Lewin* v. *Hopping. Cal.*, 576.

8. SALE—ACTUAL AND CONTINUED CHANGE OF POSSESSION.—In an action by an alleged vendee to recover the possession or value of two hay presses, taken under an attachment in an action against the vendor, the evidence reviewed, and, *held*, that the sale under which the plaintiff claimed, was void as against creditors of the vendor, because it was not accompanied by an actual and continued change of possession. *Bell* v. *McClellan. Cal.*, 259.

9. SALE OF CATTLE—ACTUAL AND CONTINUED CHANGE OF POSSESSION.—A sale of a band of cattle, the custody of which remained in the same person after as before the sale, and which were not removed from the lands of the vendor where they were grazing when sold, is void as against attaching creditors of the vendor, because not accompanied by an immediate delivery and actual and continued change of possession. *James et al.* v. *Fulkerth. Cal.*, 387.

See EXECUTORS AND ADMINISTRATORS, 1; MORTGAGE, 4.

SHERIFF.

1. SHERIFF—FOOD FURNISHED PRISONERS—REASONABLE COMPENSATION HOW DETERMINED.—A sheriff who furnishes necessary food to the prisoners in the jail is entitled to be paid a reasonable compensation therefor, under section 1,611 of the penal code. What is a reasonable compensation is to be determined, in the first instance, by the board of supervisors; such determination is not final, and if the sheriff be dissatisfied therewith, he has the right to sue the county for the amount which he claims to be reasonable. *Fulkerth* v. *County of Stanislaus. Cal.*, 334.

SHORTHAND REPORTERS.

1. OFFICIAL SHORTHAND REPORTERS—ACT OF MARCH 21, 1885, CONSTITUTIONAL.—The legislature passed an act, approved March 21, 1885, entitled, "an act to amend section 274 of an act entitled 'an act to establish a civil code of procedure,' relative to the compensation of court reporters," by which it is provided that the official reporter shall receive as compensation for his services a monthly salary, to be fixed by the judge by an order duly entered on the minutes of the court, which salary shall be

paid out of the treasury of the county in the same manner and at the same time as the salaries of county officers, with a *proviso* to the effect that such salary shall not exceed three hundred dollars per month in counties having a population of one hundred thousand and over, and shall not exceed two hundred and seventy-five dollars per month in counties having a population less than one hundred thousand and exceeding five thousand, and so on to and including counties having a population less than five thousand in which the maximum is fixed at seventy-five dollars per month. The act further provides that "in civil cases in which the testimony is taken down by the official reporter, each party, shall pay a *per diem* of two dollars and fifty cents before judgment or verdict therein is entered, and where the testimony is transcribed the party or parties ordering it shall pay ten cents per folio for such transcription on delivery thereof; said *per diem* and transcription fees to be paid to the clerk of the court, and by him paid into the treasury of the county, and such portion as shall be paid by the prevailing party may be taxed as costs in the case" *Held*, that such act was not unconstitutional; that it was not a delegation of legislative power to the judiciary or in violation of the constitutional provision requiring a uniform system of county goverments, or because it imposes a new set of officials upon the people, in contravention of section 6, article xi., of the constitution. *Smith* v. *Strother, Auditor, etc.* *Cal.*, 376.

SLANDER.

1. SLANDER—ALLEGATION ON INFORMATION AND BELIEF.—In an action for slander, an allegation in the complaint that on a certain date, and in the presence of a certain person, "as the plaintiffs are informed and believe," the defendant spoke the following words, etc., is not a sufficient averment of the speaking. Such defect goes to the sufficiency of the facts stated, and not to the manner of stating them, and may be taken advantage of by a general demurrer. *McKinney et al.* v. *Roberts.* *Cal.*, 504.

2. THE SAME—COUNSEL FEES MUST BE INCLUDED IN COST BILL.—A defendant in such action, in whose favor judgment is rendered, is not entitled to recover counsel fees, under the act of March 23, 1872, unless the same are included in his memorandum of costs. *Id.*

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE—DECLARATIONS OF AGENT WHEN INADMISSIBLE.—In an action for the specific performance of a parol contract, entered into by an agent on behalf of his principal, the declarations of such agent, made a year or two after the contract, and explanatory thereof, are inadmissible against his principal. *Clunie* v. *Sacramento Lumber Company.* *Cal.*, 279.

See EJECTMENT, 4; MONEY PAID, 1.

STATEMENT.

See APPEAL, 9, 11, 24.

STATUTE OF FRAUDS.

1. STATUTE OF FRAUDS—CONTRACT FOR PURCHASE OF LAND—ADVANCE OF PURCHASE PRICE—RESULTING TRUST.—The defendant orally agreed to advance for the plaintiff certain money to be used in paying the purchase price for land, and, as security for such advances, to take the contract for the sale thereof in his own name. This was done. *Held*, that the contract was not void under the statute of frauds, and that a resulting trust was created in the land to the extent of the advances. *Walton* v. *Karnes.* *Cal.*, 199.

See BOUNDARIES, 1; INDEMNITY, 1; MARRIED WOMEN, 7.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS—RESIGNATION OF SUPERVISORS, to avoid service of summons in a suit, does not prevent, or intercept the running of the statute of limitations. *Nash* v. *El Dorado Co.* (U. S. Cir. Ct.) *Cal.*, 1.

2. LIMITATIONS—COMMENCEMENT OF SUIT.—A suit is commenced within the meaning of the statute of limitations by the filing of a complaint, without service of summons. *Id.*

3. COUPONS—LIMITATIONS.—A right of action accrues upon coupons at the moment they fall due, and the statute of limitations commences to run upon coupons, from their maturity. *Id.*

4. SPECIAL LIMITATION ACTS CONSTITUTIONAL.—The legislature of the state of California has the power to pass special acts of legislation, applicable to a particular county indebtedness. *Id.*

5. STATUTE OF LIMITATIONS AS TO BONDS AND COUPONS.—Coupons are regarded as part of the bonds, and the same limitation applies to coupons as that applicable to the bonds, of which they constitute a part. If an action is barred on a bond in four years after it matures, the statute runs four years on the coupons attached to the bond after the coupons become due; but the statute commences to run on the bond from its maturity, and upon the coupons from the time it become payable. *Id.*

6. STATUTE OF LIMITATIONS AS DEFENSE—FINDINGS MUST INCLUDE.—Where an answer sets up the statute of limitations as a defense, a finding that "all the allegations of the plaintiff's complaint are true and correct," is not a findings on the issue of the statute of limitations. *Lewis* v. *Adams*. *Cal.*, 352.

7. STATUTE OF LIMITATIONS—COMPLAINT.—Upon a review of the facts stated in the complaint, *held*, that the action was barred by the statute of limitations. *Wilt et al.* v. *Buchtel*. *Wash.*, 468.

See OPEN ACCOUNT, 1; ADVERSE POSSESSION, 1, 3, 4, 6; CORPORATIONS, 14; DEED, 5; MORTGAGE, 10; TAXATION, 6.

STOCKHOLDERS.

See CORPORATIONS, 4–6, 13, 14.

STREET ASSESSMENT.

1. FORECLOSURE OF STREET ASSESSMENT UNDER ACT OF MARCH 16, 1864—PLAINTIFF IN ACTION—JUDGMENT.—Under the act of March 16, 1864, an action for the foreclosure of a street assessment against land in the city of Sacramento, must be brought in the name of the people of the state of California as plaintiffs, and not by the city of Sacramento. If brought in the name of the latter alone, the judgment rendered therein is void, notwithstanding it purports to be in favor of the people of the state of California, as well as in favor of the plaintiff named. *Sullivan* v. *Mier et al.* *Cal.*, 221.

STOCK EXCHANGE.

1. SAN FRANCISCO STOCK EXCHANGE BOARD—TRUST FUND—DISPOSITION OF BY MEMBER—WILL CONSTRUED.—The defendant is a voluntary unincorporated association, composed of one hundred members, who, under that name, have combined for the purpose of facilitating the purchase and sale of stock by its members. The constitution adopted by them contained the following provisions: "There shall, at all times, exist in the board a committee of at least three members, or more, to be known as the trust fund committee. * * * It shall be the duty of such committee to take charge of all moneys which may come into their hands * * * to constitute a trust fund, to be used and applied by such committee in the following manner: Upon the death of a member of the board, said trust fund committee shall pay from the increase in their hands, from investment of said moneys, to such person or persons, object or objects, as may have been designated in writing by such deceased member, the sum of ten thousand dollars." The constitution, after providing for a certain disposition of the ten thousand dollars among the widow and children of the deceased member, in case he made no disposition thereof, further provided, "that the payment herein provided for shall be deemed absolute donations to the persons, or for the object to which the same are made or applied, free from all claim or control from any other source or persons." The testator was a member of the board, and died without leaving a wife or children. His will, after leaving pecuniary legacies aggregating sixty thousand dollars, provided: "Should

my estate be worth more than sixty thousand dollars, and I now estimate it at eighty thousand dollars, including my seat in the San Francisco Stock Exchange Board, and the insurance on my life by said board, I give and devise to D. L. McDonald the sum of five thousand dollars. The balance of my estate I desire paid over to my mother." *Held*, that the defendant was not an association of persons, transacting business under a common name, and that section 388 of the code of civil procedure, permitting an action against such association by its common name, did not apply to the present action; that it was not engaged in the business of life insurance; that the donation provided for in the constitution of the board did not belong to the estate of the deceased member, and that his executors were not entitled to receive it as part of such estate; and that the will did not designate such executors as beneficiaries of the trust fund. *Swift et al., Executors, etc.*, v. *San Francisco Stock and Exchange Board. Cal.*, 592.

SUMMONS.

1. AFFIDAVIT OF SERVICE OF SUMMONS—RESIDENCE OF DEFENDANT.—Where the affidavit of service of summons states that the defendant was served in a certain county, it will be presumed that he was a resident of such county. *Pellier* v. *Gillespie et al. Cal.*, 624.

See JURISDICTION, 3.

SURETIES.

1. SURETIES—OFFICIAL BONDS—STATUTORY DUTIES IMPLIED.—A bond requiring a faithful performance of official duty, is as binding upon the principal and his sureties, as if all the statutory duties of the officer were inserted in the bond. *State* v. *Nevin. Nev.*, 160.

2. THE SAME—LIABILITY FOR PUBLIC MONEYS STOLEN.—Under the statutes of Nevada, it is the duty of a county treasurer to safely keep the public moneys, and pay it out only as provided by law. Consequently, under a bond conditioned for the faithful performance of the duties of treasurer, the mere fact that public money is stolen from such officer without any fault or negligence on his part, does not release either him or his sureties from liability therefor. *Id.*

3. LIABILITY OF A SURETY.—The liability of a surety in an official bond is *stricti juris*; and he is not to be held for the conduct of his principal beyond the scope of his undertaking, reasonably construed. *United States* v. *Adams et al.* (*U. S. Cir. Ct.*) *Or.*, 201.

4. ASSISTANT SECRETARY OF THE TREASURY—AUTHORITY OF.—The assistant secretary of the treasury is not the deputy of the secretary, but only his aid, and his acts are not valid unless specially authorized by law or prescribed by the secretary: Secs. 161, 245 R. S.; but a letter written by him to a collector of customs concerning the deposit of money in his custody, will be presumed to have been written by authority of the secretary, until the contrary appears. *Id.*

5. CASE IN JUDGMENT.—In 1866, A. was a collector of customs at Astoria, Or., when and where he received a letter signed by the assistant secretary of the treasury, directing him to take forty six thousand five hundred dollars in gold coin, theretofore received by him in payment of duties, and then in his custody, to San Francisco, and deposit the same with the assistant treasurer; in pursuance of which direction the collector sailed for San Francisco, on the current steamer, with said money in his trunk, and on the way, twenty thousand dollars of the same was stolen therefrom without any want of ordinary care and diligence on his part, a portion of which was afterward recovered, so as to reduce the loss to twelve thousand six hundred and ninety-six dollars and twenty-eight cents, for which the government sued the collector and his sureties on their bond; the defendants pleaded these facts in defense, and claimed they were not liable on the bond, to which the plaintiff demurred. *Held*, (1) That the carriage of this money to San Francisco was no part of the duty of A. as collector: Sec. 3,639, R. S.; and, therefore, his sureties are not responsible for his conduct while so engaged; and (2) that in the transportation of said money, A. was simply acting as a private carrier for the government, and is not liable on his bond for his conduct, or otherwise, except for the want of ordinary care and diligence. *Id.*

6. SURETIES—PRIVATE BOND FOR CORPORATE OFFICER—TIME FOR WHICH GIVEN.—On the fourth of June, 1881, the defendant Allen was appointed by the board of directors of the corporation defendant, its secretary, to hold his office for one year, and until his successor should be elected and qualified. On September 1, 1881, a bond was executed by the defendants, conditioned that if the said Allen "shall duly preserve and keep all such funds as may come under his control or into his possession and pay over to said company all such funds as he may not pay out in due and lawful course of business, then this obligation to be void, otherwise to remain in full force." By the by-laws of the corporation the board of directors were empowered to appoint and remove at pleasure all officers, agents and employees of the corporation, fix their tenure of office, etc. At the annual election of officers in June, 1882, Allen was re-elected secretary until the further order of the board. In an action on the bond, to recover for a defalcation occurring subsequent to December, 1882, *held*, that the defendants were not liable; that the bond expired upon the end of the term for which it was given, to wit, on June 4, 1882, when a successor was elected; and that this result was not affected by the fact that Allen was elected as his own successor. *Fresno Enterprise Company* v. *Allen et al.* *Cal.*, 568.

7. IF THE SURETIES ON SUCH BOND ARE NOT LIABLE, the principal is not. *Id.*

8. SURETIES—PAYMENT OF DEBT OF PRINCIPAL.—Sureties who are compelled to pay a debt of their principal have a legal demand for reimbursement, which they may enforce against him by personal action if he be alive, or against his estate if he be dead. But, in either case, reimbursement can only be claimed for what has been expended. *Estate of Hill, Deceased.* *Cal.*, 183.

9. THE SAME—JUDGMENT AGAINST SURETIES WHEN DEMAND AGAINST ESTATE OF PRINCIPAL.—Sureties on an official bond, against whom a judgment has been rendered for the amount of a defalcation of their principal are not creditors holding an enforceable demand against the estate of the latter, until such judgment has been paid by them. *Id.*

SURVEYS.

1. UNITED STATES SYSTEM OF SURVEYS—AREA OF QUARTER SECTION—JUDICIAL NOTICE TAKEN OF.—Courts will take judicial notice that, under the system adopted by the United States for surveying and marking out its public lands, a quarter section is intended to be just forty chains square; and whenever a claim is made that a quarter section contains a greater area, affirmative proof must be produced that the lines were so run upon the ground as to include that greater area. *Quinn* v. *Windmiller.* *Cal.*, 518.

SWAMP LANDS.

1. RECLAMATION OF SWAMP LANDS—ACTION FOR DELINQUENT ASSESSMENT MAY BE BROUGHT IN NAME OF DISTRICT.—An action to recover delinquent assessments for the reclamation of swamp lands, may be brought in the name of the reclamation district, as the real party in interest. *Reclamation District No. 3* v. *Parvin et al.* *Cal.*, 555.

2. THE SAME—COMMISSIONERS MUST JOINTLY VIEW AND ASSESS.—The provision of section 33 of the reclamation statute, requiring the commissioners to "jointly view and assess upon each and every acre to be reclaimed or benefited, a tax," etc., only means that the three commissioners, acting jointly or together, shall view or assess, etc. *Id.*

3. SWAMP LAND DISTRICT—REORGANIZATION OF DE FACTO—VALIDITY OF REORGANIZED CORPORATION—QUO WARRANTO.—Swamp land, levee and reclamation districts *de facto*, acting as such in good faith and under an attempted compliance with law, may, under section 3,489 of the political code, be united, consolidated or reorganized, so as to form a new corporation in all respects valid; and proceedings in the nature of a *quo warranto* against such new corporation, cannot be extended to an inquiry and determination as to the regularity of the several steps by which such original districts were organized. *People* v. *La Rue et al.* *Cal.*, 581.

TAXATION.

1. MORTGAGE TAX LAW OF 1882.—On the question of whether this act of the legislature conforms to the constitution of Oregon, this court follows the judgment of the

supreme court of the state, in Mumford v. Sewell, 11 Or., 67, 3 West Coast Rep., 712, and Crawford v. Linn county, Id., 482, 5 West Coast Rep., 492; and on the question, is it in conflict with the constitution of the United States, the ruling of this court in the Dundee Mortgage Trust Investment Company v. School District No. 1, 19 Fed. Rep., 359, 2 West Coast Rep., 241, and 21 Id., 151, 3 West Coast Rep., 606, is followed. *Dundee Mortgage Trust Investment Company* v. *Parrish et al.*; *American Freehold Land Mortgage Company of London* v. *Groves et al.*; *New England Mortgage Security Company* v. *Groves et al.* (*U. S. Cir. Ct.*) *Or.*, 133.

2. AN ACT FOR RAISING REVENUE.—The mortgage tax law does not levy any tax or raise any revenue, but only provides that when a tax is levied or a revenue raised, that mortgages shall contribute thereto as land. *Id.*

3. UNEQUAL ASSESSMENTS.—Where the law requires that mortgages shall be valued for taxation at their face value, and all lands at their "true cash value," and the assessor of a county willfully and uniformly values the mortgages on lands therein at their face value, and the lands therein at only one-third of their cash value, such assessment is illegal, and the payment of the two-thirds of the tax thereby imposed on said mortgages may be enjoined. *Id.*

4. TENDER OF PAYMENT OF TAX.—A suit to enjoin the collection of a tax cannot be maintained in the courts of the United States, unless it appears that the plaintiff has paid or offered to pay so much of such tax as he concedes to be due, or as may be shown that he ought to pay. *Id.*

5. TAXATION—ILLEGAL TAX—INJUNCTION.—Equity will not restrain the enforcement of an entire tax, part of which is illegal, unless the portion which is legal has been paid. *Brown et al.* v. *School District, No. 1. Or.*, 60.

6. TAX DEED—INSUFFICIENT DESCRIPTION—COLOR OF TITLE—STATUTE OF LIMITATIONS.—A tax deed, although insufficient to pass title, by reason of an imperfect description of the premises, is admissible in evidence to show that the person claiming under it was holding under color of title, and, in connection with proof of possession, is competent to establish the defense of the statute of limitations. *Smith* v. *Shattuck. Or.*, 36.

7. TAX DEED—SUFFICIENT DESCRIPTION.—A description of property, in a tax deed, as "thirty-seven and one-half acres of land in sec. 11, township 1 south, range 1 east, known as Smith's farm, in Multnomah county, Oregon," is sufficiently definite to pass title, if the identity of the land can be ascertained. *Id.*

8. A TAX SALE, FOR ANYTHING MORE THAN IS LAWFULLY CHARGEABLE, is a sale without jurisdiction, and void. *Boston T. Co.* v. *McKenzie. Cal.*, 528.

9. A TAX SALE IS VOID, IF THE PROPERTY BE SOLD FOR A SUM GREATER, by one dollar, than was authorized by law. *Axtell* v. *Gerlach et al. Cal.*, 536.

10. UNLAWFUL CHARGES MADE ON SALE FOR DELINQUENT TAXES.—The act of 1880, providing for the protection of lands from overflow, other than lands recognized as swamp lands, does not authorize a charge of fifty cents for cost of preparing a delinquent list, or fifty cents for costs of certificate of sale. *Id.*

11. VOID TAX DEED—INJUNCTION WHEN LIES TO RESTRAIN.—Injunction lies to restrain the making of a tax deed, under a sale void because made for a sum greater than that authorized by law. Such deed would not necessarily show the invalidity of the sale, if executed in conformity with the certificate of sale, and, if it did not, then evidence would be required *dehors* the recitals of the deed to ascertain the illegality of any of the items, to collect which the sale was made, and a cloud would be cast on the title. *Id.*

12. VOID CERTIFICATE OF SALE FOR TAXES—ACTION TO QUIET TITLE AGAINST—INJUNCTION.—Under section 738 of the code of civil procedure, an action to quiet title against, and to cancel a void certificate of sale for taxes, may be maintained. In such action, if an injunction be granted against the making of a tax deed, the judgment will not be reversed. *Id.*

13. ORDINANCES OF LOS ANGELES—EXEMPTION OF DEFENDANT FROM TAXATION.—Upon a review of certain ordinances of the city of Los Angeles, and a certain contract made between it and the defendant, held that the same did not constitute a contract that the business of the defendant when established and prosecuted, or its property, were to be free from the burdens of taxation, or exempt from such license tax as might be lawfully imposed upon other persons owning like property

and using it in like manner. *City of Los Angeles* v. *Southern Pacific Railroad Company*. *Cal.*, 416.

TENANT AT WILL.

See EJECTMENT, 3.

TIDE LANDS.

1. TIDE LANDS—OPTION TO PURCHASE—PURCHASE OF—ANNULLING PATENT.—Conceding that the state has an absolute ownership in lands between high and low tides, a party who has an option under a statute, to become a prior purchaser thereof, under certain conditions, has no equitable title therein, which can be enforced against another purchaser. His remedy in such case is to have the state commence an action against the purchaser to annul the patent issued to him, and, upon obtaining such relief, make an application for the purchase of such land. *Wilson et al.* v. *Welch et al.* *Or.*, 54.
2. THE SAME—TIDE LANDS PASS WITH DEED TO UPLANDS.—The rights which an owner of uplands, bordering on the banks of a navigable stream, has in the adjacent tide lands, passes by a deed of the former lands, unless an intention is manifested to reserve them from the operation of the conveyance. *Id.*

TITLE.

See ADVERSE POSSESSION, 1; DEED, 1-3; EJECTMENT, 1; EVIDENCE, 7; GARNISHMENT, 1; MORTGAGE, 13.

TRANSCRIPT.

See APPEAL, 18, 20, 29; POINTS AND AUTHORITIES, 5.

TRANSFER OF ACTION.

1. SETTLEMENT OF STATEMENT OF CASE—DISQUALIFICATION OF JUDGE—TRANSFER OF ACTION TO ADJOINING COUNTY.—The plaintiff recovered judgment against the defendant in the superior court of Amador county, on the eighteenth day of November, 1884. Thereafter, within the time allowed by law, the defendant served a notice of intention to move for a new trial, and prepared and served his statement of the case, and the plaintiff prepared and served amendments to the statement. The statement and amendments were delivered to the clerk of the court for the judge. On the fifth day of January, 1885, the term of office of the judge before whom the case was tried expired, and the attorney who tried the case for the defendant became the judge of the court. *Held*, that, under section 398 of the code of civil procedure, the plaintiff was entitled to have the case transferred to the superior court of an adjoining county, upon the ground that the judge of the court was disqualified from further acting in the case. *Finn* v. *Spagnoli*. *Cal.*, 349.

See REMOVAL OF CAUSES, 1, 2.

TRESPASS.

1. CONFLICT OF EVIDENCE—VERDICT NOT DISTURBED.—Where the evidence is conflicting, in an action to recover for trespass upon a mining claim, as to the amount of damages suffered by the plaintiff, the verdict of the jury therein will not be disturbed. *Empire G. Mining Co.* v. *Bonanza G. Mining Co.* *Cal.*, 395.
2. TRESPASS—INSTRUCTIONS—MEASURE OF DAMAGES.—In such action, the defendant cannot complain of an instruction that if the jury found that he entered upon the plaintiff's claim, and dug and removed gold-bearing earth therefrom, the true measure of damages to plaintiff would be an amount of money which will fully compensate him for all detriment proximately caused thereby. *Id.*
3. THE SAME—PLAINTIFF ENTITLED TO NOMINAL DAMAGES.—For every trespass upon real property the plaintiff is entitled to, at least, nominal damages. Consequently, the defendant cannot justify his act, and obtain a verdict by showing the value of the property to be less than the expense of its severance from the realty. *Id.*

See APPEAL, 3.

TRIAL.

See AMENDMENT, 1; CRIMINAL LAW, 1.

TRUST.

1. PURCHASE OF LAND—CONSIDERATION PAID BY ANOTHER—TRUSTS.—When land is purchased, for which one party pays the consideration and another party takes the title, a resulting trust immediately arises in favor of the party paying the consideration, and the other becomes his trustee; and if one party pays only a part of the consideration, the party taking the title to the whole land becomes a trustee for the other, *pro tanto*. *Somers* v. *Overhusler et al.* *Cal.*, 210.

2. TRUST—CONSIDERATION MOVING FROM ANOTHER—PRESUMPTION MAY BE REBUTTED.—When a transfer of real property is made to one person, and the consideration thereof is paid by or for another, the presumption, under section 853 of the civil code, that a trust is created in favor of the person by or for whom such payment is made, may be rebutted by evidence that the intention of the parties was otherwise. The evidence in this case reviewed and held sufficient to sustain the findings hat no trust was created. *Tyron* v. *Huntoon, Administrator, et al.* *Cal.*, 290.

See PARTNERSHIP, 4; STATUTE OF FRAUDS, 1; STOCK EXCHANGE, 1.

ULTRA VIRES.

See COUNTIES, 2.

UNCERTAINTY.

See DEED, 5.

UNDERTAKINGS.

See APPEAL, 27.

UNDUE INFLUENCE.

See EVIDENCE, 12.

UNLAWFUL COHABITATION.

1. UNLAWFUL COHABITATION—INDICTMENT—IMMATERIAL ALLEGATIONS.—Section 3 of the act of March 22, 1882, provides that "if any male person hereafter cohabit with more than one woman he shall be deemed guilty of a misdemeanor." *Held*, that an indictment for such offense, under the criminal procedure act, charging unlawful cohabitation with certain women named, need not allege that the defendant was a "male person," as the law would presume such fact, or that he cohabited with them as "his wives." *United States* v. *Cannon*. *Utah*, 68.

2. THE SAME—DESCRIPTION OF OFFENSE.—In an indictment for an offense created by statute, it is sufficient to describe the offense in the language of the statute. *Id.*

3. THE SAME—SEXUAL INTERCOURSE UNNECESSARY.—Sexual intercourse is not a necessary element to the commission of such offense, and need not be alleged or proved. Consequently, it is not error for the court to exclude evidence offered by the defense tending to show non-access during he t mes charged. *Id.*

4. THE SAME—RELATIONSHIP BETWEEN DEFENDANT AND WOMEN.—On a trial of such indictment evidence of the relationship existing between the defendant and the women at and prior to the passage of the act of March 22, 1882, is admissible. *Id.*

5. THE INSTRUCTIONS GIVEN REVIEWED, and held to correctly state the law applicable to the case. The instructions refused held to have been irrelevant and immaterial. *Id.*

6. UNLAWFUL COHABITATION—SEXUAL INTERCOURSE UNNECESSARY TO CONSTITUTE OFFENSE.—In order to constitute the offense of unlawful cohabitation, within the meaning of section 3 of the act of March 22, 1882, sexual intercourse is not essenal. *United States* v. *Musser*. *Utah*, 116.

7. THE SAME—EVIDENCE OF OFFENSE.—On a trial for such offense, alleged to have been committed between certain dates, evidence of the defendant's relations and conduct with the women named in the indictment, prior to the first named date, as well as prior to date of such act, is admissible. *Id.*

See POLYGAMY.

USE AND OCCUPATION.

See COUNTER CLAIM, 2.

USURY.

1. USURY—NATURE OF DEFENSE—BURDEN OF PROOF.—To establish the defense of usury requires clear and cogent proof, and the court will not accept vague inferences or mere probabilities, or resort to conjectures. The burden of proof is on the defendant, and he must sustain his allegations by a clear preponderance of evidence. Tested by these rules, the evidence is insufficient to sustain the charge of usury alleged. *Poppleton* v. *Nelson et al.* *Or.*, 41.

VALUE.

See EVIDENCE, 5, 9.

VENDOR AND VENDEE.

See EJECTMENT, 4-7; SALE, 2.

VERDICT.

1. NONSUIT IN NATIONAL COURTS.—A nonsuit at the close of plaintiff's case, is never granted in the national courts. The proper practice in such courts, where the evidence for plaintiff fails to make a *prima facie* case, is to instruct the jury to find a verdict for the defendant. *Bunt* v. *Sierra Buttes G. M. Co.* (*U. S. Cir. Ct.*) *Cal.*, 437.
2. INSUFFICIENT EVIDENCE.—Where the evidence is such that the court would feel bound to set aside any verdict in favor of plaintiff, it is the duty of the court to direct a verdict for defendant. *Id.*
3. COURT CANNOT DIRECT VERDICT.—Under the provisions of the civil code, the court has no power to direct the jury to find a verdict in a certain way. *Smith* v. *Shattuck.* *Or.*, 36.
4. FINDING OF JURY—REVIEW OF ON APPEAL.—When there is any evidence, however meagre, calculated to prove any fact in a case, it is the province of the jury to weigh it and determine its effect; with such determination the su preme court has no right to interfere. *Id.*
5. EXCESSIVE VERDICT—COURT MAY REMIT EXCESS.—Where a verdict is rendered for an amount in excess of that demanded in the complaint, the court has power, before the entry of judgment, to permit the plaintiff to remit the excess, and to take judgment for the amount demanded. *Clanton* v. *Coward.* *Cal.*, 363.
6. GENERAL AND SPECIAL VERDICT—POWER OF COURT TO DIRECT.—Under section 1,400 of the compiled laws of 1876, the trial court has discretion to direct a general or special verdict, or special as to the controverted facts, and general as to those not controverted on the trial. *Smith* v. *Ireland.* *Utah*, 322.
7. FINDINGS SUSTAINED BY EVIDENCE.—The findings that the sale in question was made to hinder, delay and defraud the creditors of the vendor, held sustained by the evidence. *Id.*
8. VERDICT—PREPONDERANCE OF EVIDENCE.—A verdict will not be set aside unless the court is satisfied it is against a clear preponderance of the evidence. *Id.*
9. INCOMPETENT EVIDENCE—ADMISSION OF WHEN IMMATERIAL.—The admission of incompetent evidence will not warrant a reversal, if the court is satisfied, from the other evidence, that the jury did substantial justice between the parties. *Id.*

10. VERDICT—APPEAL—CONFLICT OF EVIDENCE.—A judgment, based upon a verdict, where there is a substantial conflict in the evidence, will not be disturbed by the appellate Court. *Arizona Prince Copper Company* v. *Copper Queen Mining Company*. *Ariz.*, 317.

11. MISCONDUCT OF JURY—DRINKING INTOXICATING LIQUORS.—The fact that, pending their deliberations, the jury drank intoxicating liquors, at the joint expense of the parties to the litigation, will not vitiate the verdict, unless it appears that some of the jurors became so intoxicated as to be disqualified for the proper discharge of his duty. *Id.*

See EJECTMENT, 4; WATER AND WATER RIGHTS, 8.

WAIVER.

See INSURANCE, 6; JURY.

WATER AND WATER RIGHTS.

1. APPROPRIATION OF WATER—EVIDENCE.—The evidence as to the quantity of water the plaintiff had the right to appropriate reviewed, and the finding thereon held sustained by the evidence. *Junkans* v. *Bergin et al.* *Cal.*, 225.

2. THE SAME—POINT OF DIVERSION MAY BE CHANGED.—One having a prior right to divert a given quantity of water from a certain stream, may take the same at any point on the stream, and may change the point of diverson at pleasure, if the rights of other appropriators be not injuriously affected by the change. *Id.*

3. THE SAME—WRONGFUL DIVERSION.—Upon a review of the evidence, *held*, that the defendants had diverted a portion of the water to which plaintiff was entitled, and thereby did him damage. *Id.*

4. CONFLICT OF EVIDENCE—FINDINGS—APPROPRIATION OF WATER.—In an action to determine conflicting rights to the waters of a given stream, where each party claims under an appropriation, the findings of the lower court will not be disturbed when the evidence is conflicting. *Lowden* v. *Frey et al.* *Cal.*, 538.

5. THE FINDINGS AND EVIDENCE REVIEWED, and *held* not to entitle the plaintiff to a judgment for damages. *Id.*

6. APPROPRIATION OF WATER FOR MINING PURPOSES—NOT LOST BY EXHAUSTION OF MINE.—An appropriation of water for mining purposes generally, to be used at various points, is not lost by the exhaustion of the mine for which it was appropriated. *Id.*

7. DIVERSION OF WATER—ACTION TO RESTRAIN IS IN EQUITY—NUISANCE.—An action to recover damages for the obstruction, diversion and use of the waters of a stream, and for an injunction restraining the same, is a case in equity for abating a nuisance. *Evans* v. *Ross et al.* *Cal.*, 602.

8. THE SAME—JURY TRIAL—VERDICT IS ADVISORY ONLY—GENERAL VERDICT.—In such action a party is not entitled to a jury, but it is in the discretion of the court to call one. When a jury is called, the court directs proper issues to be framed and submitted to it. The verdict on such issues is only advisory to the court, and it may adopt the findings of the jury or reject them, and itself find the facts. A general verdict is insufficient, and should be disregarded. Consequently, a refusal to direct the jury to find a general verdict is not error. *Id.*

9. THE SAME—ADVERSE POSSESSION.—An action to enforce the right to water can be barred by five years' adverse possession. The findings reviewed and held to show such adverse possession. *Id.*

10. THE SAME—SEVERAL DIVERSION—JOINT ACTION FOR DAMAGES.—A joint action to recover damages for the diversion of water cannot be maintained against two defendants, each of whom made the diversion for his own benefit, separately from and without any collusion, arrangement or understanding with his co-defendant, and without any consent or joint action between them. *Id.*

11. AGREEMENT FOR SALE OF WATER CONSTRUED.—An agreement for the sale and delivery of water construed, and held under it, the plaintiff was bound to maintain a ditch for delivery of the water through it, and to convey this water continuously through this ditch to a place specified, at such an elevation that the water might be conducted therefrom to the defendant's mine; and that the defendant was not

bound to put himself in a position to receive such water, so that it would not flow to waste. *Sierra Union Water and Min. Co.* v. *Baker*. *Cal.*, 734.

See ADVERSE POSSESSION, 3; INJUNCTION, 1.

WILLS.

1. WILL—DEED—COPY OF DEED AND LETTER WHEN AN OLOGRAPHIC WILL.—Prior to his death deceased executed an ordinary deed of bargain and sale of certain land to his sister. The deed was properly acknowledged and dated, and witnessed by two witnesses, but never delivered, and was not entirely in the handwriting of deceased. Among his papers was found, enclosed in the same envelope, a copy of the deed, and a letter to his sister, each in the handwriting of the deceased. In the letter the following was written: "We all know life is uncertain; and we don't know the moment we may be called away. * * * I, therefore, want you to know you are provided for under any circumstances. * * * My intention is to provide for you while I live, the same as I have always done, and, hereafter, if it should please God to call me away, you will have your own property to depend on, sufficient to make you independent while you live." *Held*, that the deed itself was inoperative as a will, as the deceased did not declare to the witnesses that it was his will. That the copy of the deed, and the letter, taken together, showed an *animus testandi*, and should be admitted to probate as an olographic will. *Estate of Skerrett, Deceased*. *Cal.*, 626.

2. ESTATE OF DECEASED PERSONS—DEVISE TO RELATIONS AS A CLASS.—The testator, a naturalized citizen of the United States, died domiciled in France. His next of kin him surviving, were three De Laurencels, children of a deceased sister, and five De Booms, children of a deceased brother. All his property was devised in trust for certain specified purposes, with a direction that after the expiration of ten years the same was to go to the De Booms and De Laurencels. In the instructions to the trustee, he directed that at that time he should "disclose to all my heirs, the De Booms as well as the De Laurencels, the state of my succession." *Held*, that the devise was to the De Booms and Laurencels, as a class, and that they were entitled to share equally. *De Laurencel et al.* v. *De Boom*. *Cal.*, 351.

3. CONTEST OF WILL—CONTESTANTS ARE PLAINTIFFS.—On the trial of the contested probate of a will, the contestants are plaintiffs and the petitioner defendant, under sections 607 and 1,312 of the code of civil procedure. *Estate of Dalrymple, Deceased*. *Cal.*, 493.

4. THE SAME—CONFLICT OF EVIDENCE—VERDICT.—The verdict of the jury on the issues submitted to them on such contest will be upheld when the evidence is conflicting. *Id.*

5. EVIDENCE—CONDITION OF TESTATOR'S MIND PRIOR TO EXECUTION OF WILL.—A witness may testify as to the condition of the testator's mind at a period prior to the execution of the will, when the disease causing his insanity was a progessive one. *Id.*

6. WAIVER OF RIGHT TO SUBMIT ISSUES TO JURY—FINDINGS.—On such contest, if the contestants neglect to submit certain issues to the jury, they waive their right so to do, and it then becomes the duty of the court to find upon such issues. *Id.*

See STOCK EXCHANGE, 1.

WITNESSES.

1. WITNESS—UNREASONABLE DETENTION—HABEAS CORPUS.—A witness, who has been detained, as such, for ninety days, and after several continuances in the case which are not satisfactorily accounted for, is entitled to be discharged, on *habeas corpus*. *Ex parte Dresler, on Habeas Corpus*. *Cal.*, 212.

See EVIDENCE, 8, 10, 11, 15; MURDER, 13.

WRIT OF REVIEW.

See CERTIORARI.

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